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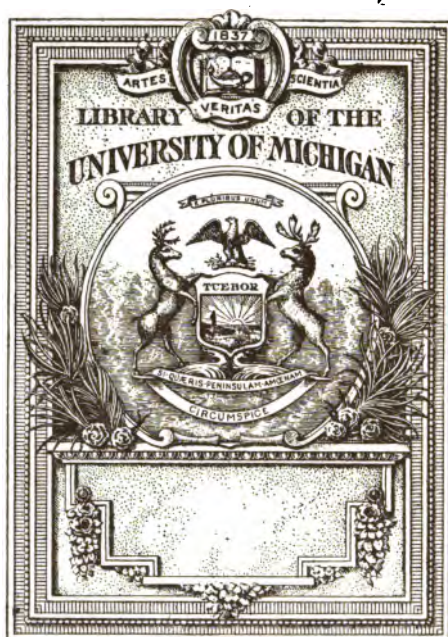
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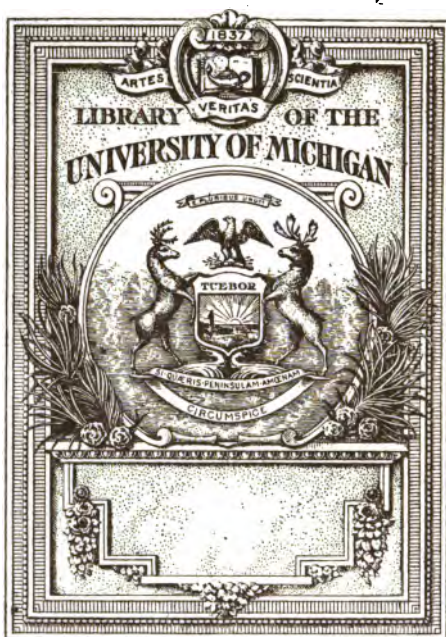
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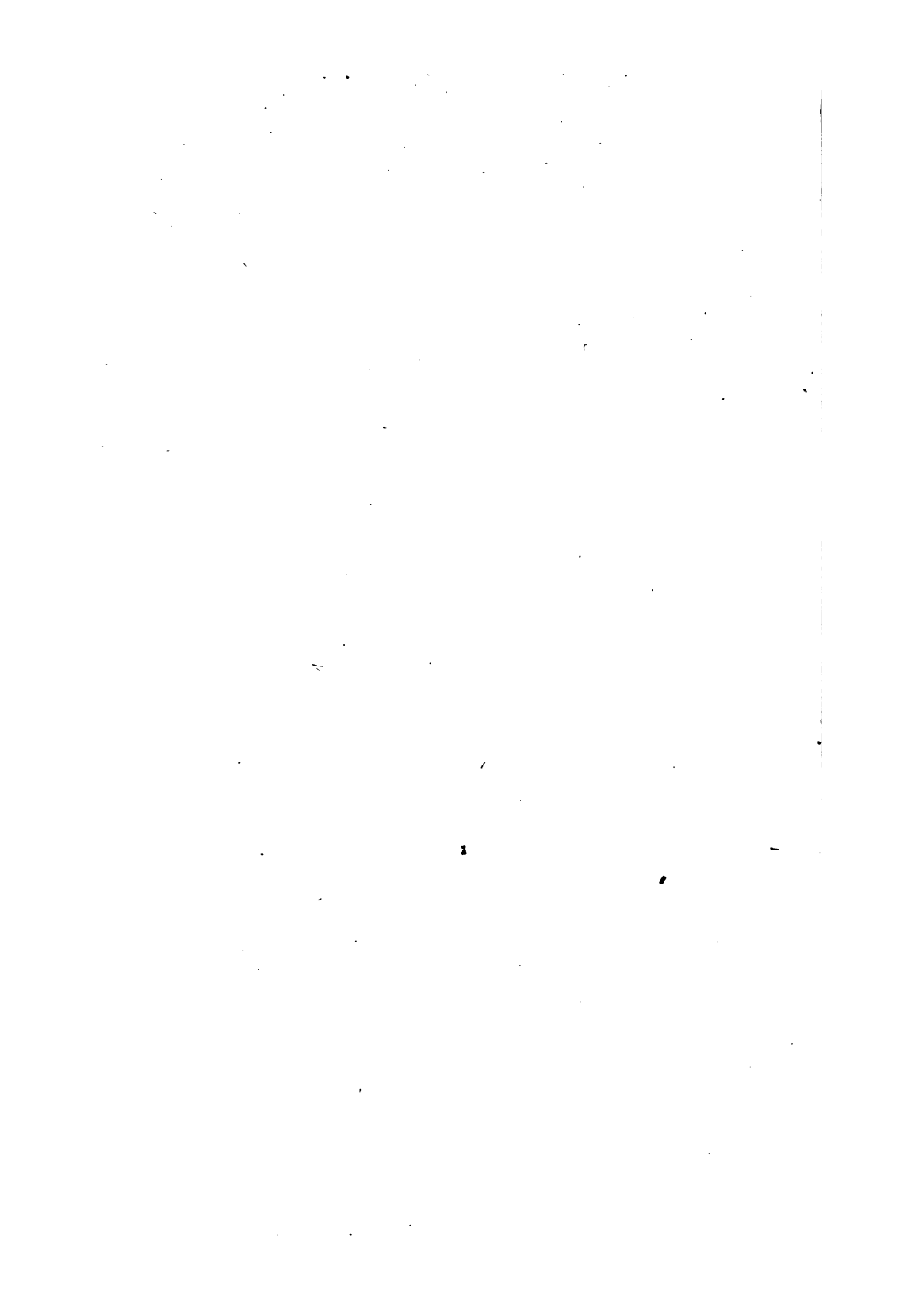
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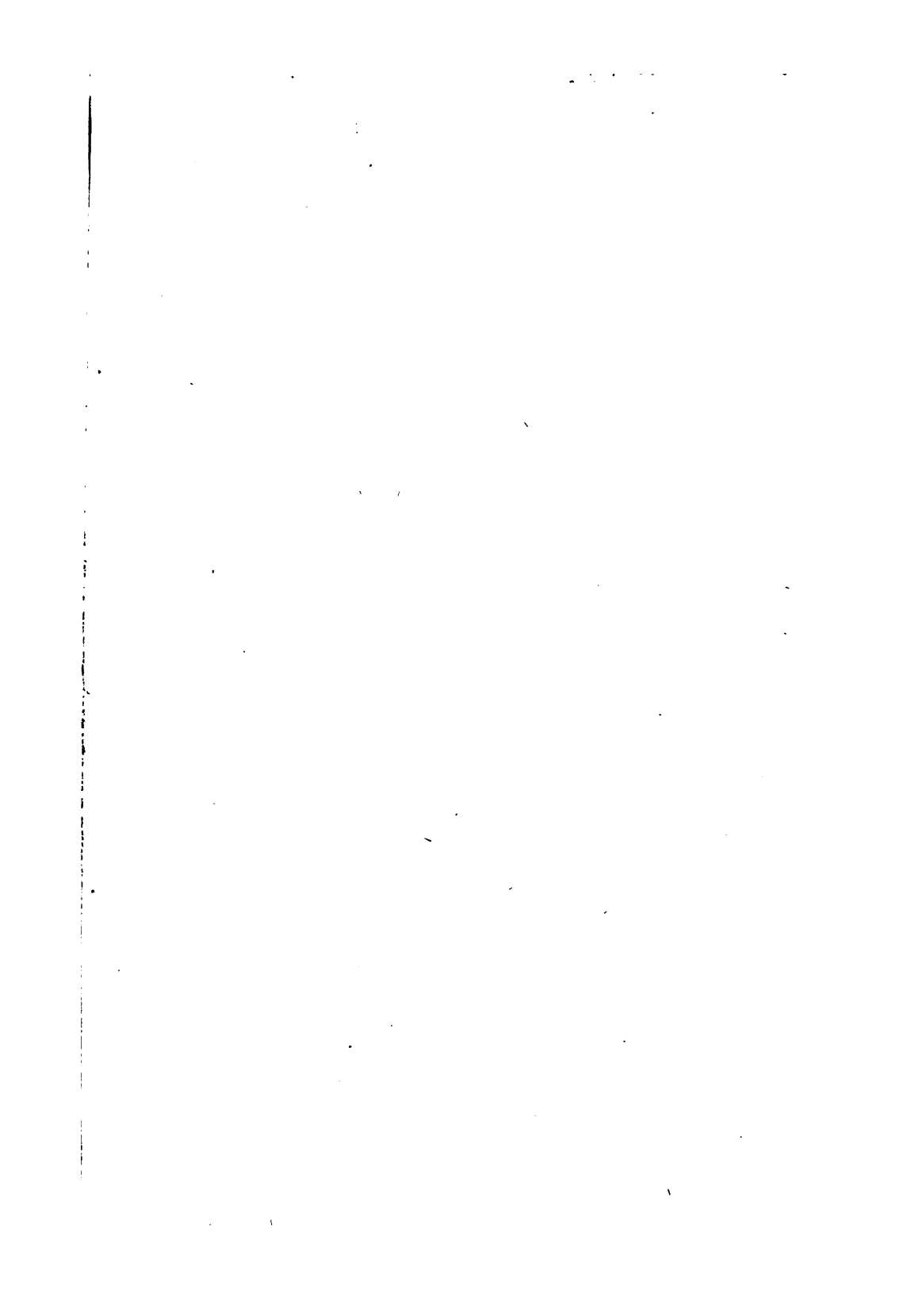


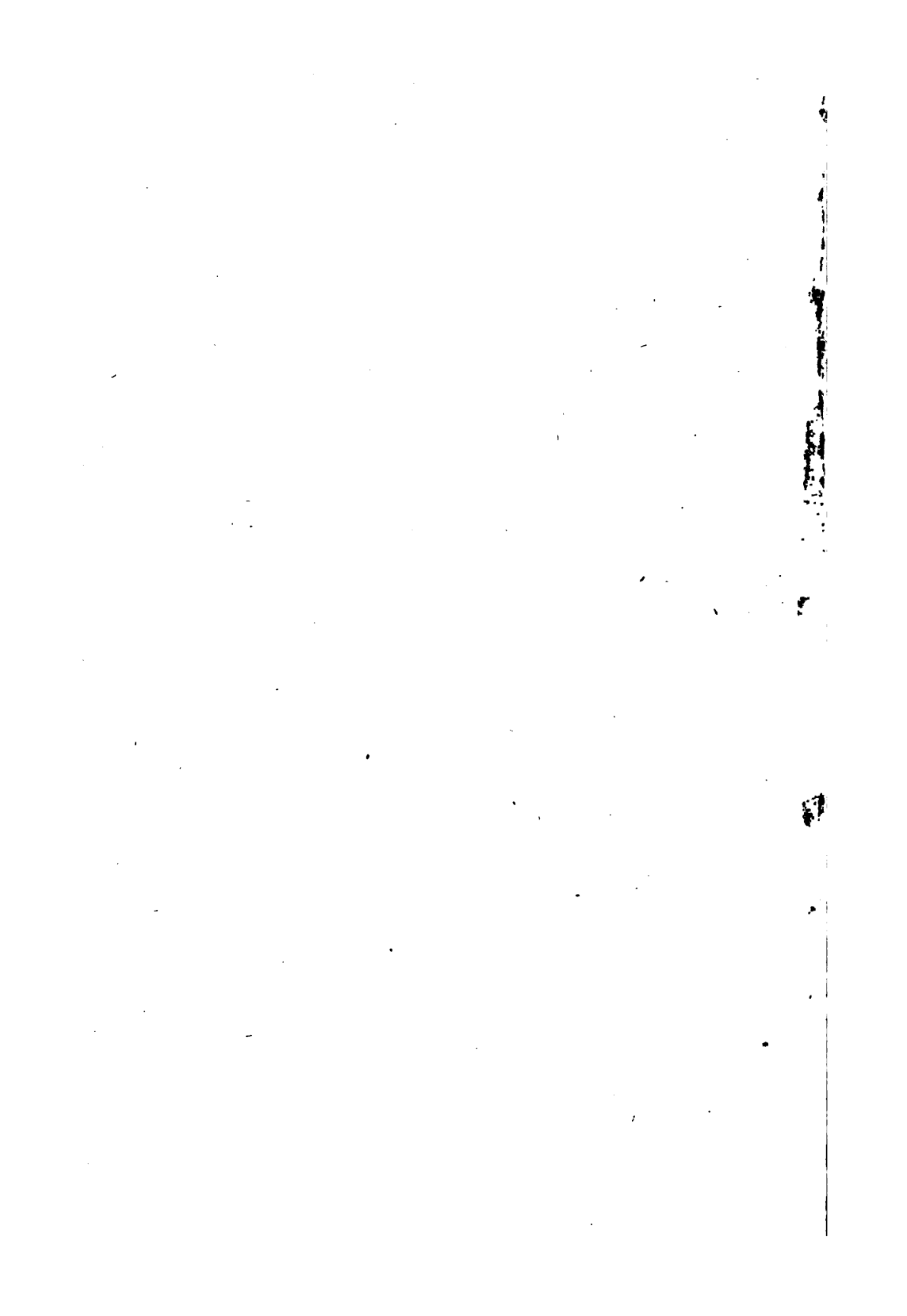
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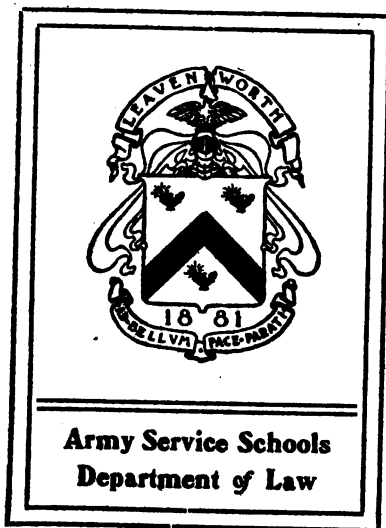




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Cases on **MILITARY
GOVERNMENT**

Compiled by the Staff Class
1910 - 11



Fort Leavenworth, Kansas
1911

ARMY SERVICE SCHOOLS PRESS—1911

LIST OF CASES PREPARED BY THE STAFF CLASS OF
1910-11

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Power to Declare War

The Prize Cases

Supreme Court of the United States, 1862, 2 Black 635

Statement of the Case

These were cases in which the vessels named, together with the cargoes, were severally captured and brought in as prizes by public ships of the United States, under the terms of the President's Proclamation of April 15th, 19th, and 27th, 1861, declaring a blockade of the seceded States.

In each case the District Court pronounced a decree of condemnation on behalf of the United States, and the officers and crews of the *capturing ships*. The claimants appealed to the U. S. Supreme Court.

The Amy Warwick was a merchant vessel whose registered owners resided at Richmond, Virginia. At Rio de Janeiro, Brazil, she shipped a cargo of coffee, to be delivered at New York, Philadelphia, Baltimore or Richmond, according to the orders which the master should receive at Hampton Roads, Virginia. Under American colors with her commander ignorant of the war, she was captured July 10, 1861.

She was libelled as enemy's property. The claimants denied any hostility to the laws or Government of the United States.

The Crenshaw, whose owners resided in Richmond, Virginia, was bound for Liverpool with a cargo of tobacco from Richmond, Virginia, when she was captured at the mouth of the James River, May 17, 1861.

The plea of the claimants, both of the vessel and of the cargo, admitted the existence of the insurrection in Virginia, but asserted their innocence of it. They also asserted they had no such notice of the blockade as rendered the vessel or cargo liable to seizure for leaving the port of Richmond at the time when the voyage was commenced.

She was condemned as prize because she had broken, or was attempting to break the blockade at the time of her capture.

The Hiawatha was a British barque, which left Richmond, May 17, 1861, for Liverpool, where her owners resided, with a cargo of tobacco. She was captured in Hampton Roads, May 20, 1861. The owners of the vessel and claimants of the cargo claimed that no sufficient notice had been given of the blockade.

The Brilliante was a regularly registered Mexican schooner whose owners resided in Campeche, Mexico. She had a cargo of flour owned by Mexican citizens and taken on board at New Orleans for Sisal and Campeche, Mexico, for which ports the vessel took a clearance.

The principal owner, both of the vessel and cargo, was a naturalized American citizen who was, at the time of the seizure and before, U. S. Consul at Campeche, Mexico.

On her homeward voyage, while at anchor in Biloxi Bay, Mississippi, intending to communicate with some vessel of the blockading fleet in order to get a permit to go to sea she was captured.

THE POINTS OF LAW TO BE DECIDED

There are certain propositions of law, said the Court, which must necessarily affect the ultimate decision of these cases, which will be proper to discuss

and decide before we notice the special facts peculiar to each.

1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law, as known and acknowledged among civilized states?

2d. Was the property of persons domiciled or residing within those states a proper subject of capture on the sea as "enemies' property"?

OPINION OF THE COURT

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. Neutrals have the right to enter the port of a friendly nation for the purpose of trade and commerce, but they are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, the blockade, for the purpose of subduing the enemy.

It is an admitted fact in these cases, that a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861.

It has not been, and cannot be disputed, that the President, as the Executive Chief of the Government and Commander-in-Chief of the Army and Navy, was the proper person to make such notification.

The right of prize and capture has its origin in the "*jus belli*" and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto* and the neutral must have knowledge or notice of the intention of one belligerent to blockade the port or country of the other. At the

time this blockade was instituted did a state of war exist which would justify a resort to these means of subduing the hostile force?

“Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State; the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

* * * * *

“As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.

“The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: ‘When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists* and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land’.”

By the Constitution, the power to declare a national or foreign war resides in Congress alone. But Congress cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers the whole Executive power on the President. He is bound to take

care that the laws be faithfully executed. But though he is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States, yet he has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28th, 1785, and 3d of March, 1807, the President is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State of the United States.

“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be ‘unilateral’.

* * * * *

“This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.”

Because one side may call it an insurrection and consider the insurgents as rebels or traitors makes it none the less a civil war.

Nor is it necessary that the independence of the revolted territory or State be acknowledged in order to constitute it a party belligerent according to the laws of war.

By a declaration of neutrality foreign nations acknowledge it as war.

On this subject, in the case of the *Santissima Trinidad*, (7 Wheaton 337) this court says:

“The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war.” (See also 3 Binn. 252.)

On the 13th of May, 1861, as soon as the news of the attack of Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, a proclamation of neutrality, “recognizing hostilities as existing between the Government of the United States of America and *certain States* styling themselves the Confederate States of America”, was issued by the Queen of England. This proclamation was immediately followed by similar declarations or silent acquiescence by other nations.

“After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals.

* * * * *

“Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. ‘He must determine what degree of force the crisis demands.’ The proclamation of the blockade is itself official and conclusive evi-

dence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case."

If it were necessary to the technical existence of a war, that it should have a legislative sanction, this is found in almost every act passed at the extraordinary session of the Legislature of 1861. This session was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, Congress "*ex majore cautela*" and in anticipation of such astute objections, passed an act approving, legalizing, and making valid all the acts, proclamations, and orders of the President, etc., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States.

The objection that this ratification act is *ex post facto* might have weight on the trial of an indictment in a criminal court. It has no authority in a tribunal, administering public and international law.

"On this first question therefore we are of the opinion that the President has a right, *juri belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard."

II. In the consideration of the second question the question arises:—What is included in the term "enemies' property"?

Is the property of all persons residing within the territory of the States in rebellion, captured on the high seas, to be treated as "enemies' property" whether the owner be in arms against the Government or not?

A necessary result of the state of war is the right of one belligerent not only to coerce the other by direct force but also to cripple his resources by the seizure or destruction of his property. Money and

wealth, the products of agriculture and commerce, are the sinews of war. They are as necessary in its conduct as numbers and physical force. For this reason the laws of war recognize the right of a belligerent to cut these sinews of power of the enemy, by capturing his property on the high seas.

The contention of the appellants is that the term "enemy" is properly applicable to those only who are subjects or citizens of a foreign State at war with our own.

Another of their contentions is that insurrection is the act of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law, that confiscation of their property must be done under a municipal law involving the owner in a conviction of an offense.

Now, it has never been doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights. (See 4 Cr. 272.) Should the sovereign treat the other party as a belligerent and use only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, this cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity.

Under the peculiar Constitution of this Government, although the citizens owe supreme allegiance to the Federal Government, they owe also a qualified allegiance to the State in which they are domiciled. To its laws their persons and property are subject.

In organizing this rebellion, therefore, they have acted as States claiming to be sovereign over all persons and property within their respective limits, They asserted a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be recognized by the world as a sovereign State.

"Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the General Government. It is no loose, unorganized insurrection, having no definite boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized hostile and belligerent power.

"All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors.

* * * * *

"Whether property be liable to capture as 'enemies' property' does not in any manner depend on the personal allegiance of the owner. 'It is the illegal traffic that stamps it as 'enemy's property'. It is of no consequence whether it belongs to an ally or a citizen. 8 Cr.384. The owner, *pro hac vice*, is an enemy.' 3 Wash. C.C.R.,183

"The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he resides and trades within their territory."

III. The facts peculiar to the several cases were then considered, the principles above stated were held to apply to all of them, and the decrees below were affirmed, except in case of some tobacco on the Crenshaw, bought and paid for by a citizen of New York before hostilities began. This was restored as not being enemies' property.

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NOTES

1. In *Miller vs. the United States*, 11 Wall. 268 (1870), which was a proceeding under the Confiscation Acts of August 6, 1861, and July 17, 1862, to confiscate certain shares of stock in two corporations created by the State of Michigan belonging to Samuel Miller, a rebel citizen whose property was confiscable under the terms of those acts, the Supreme

Court of the United States held that these acts were constitutional; that, excepting the first four sections of the act of July 17, 1862, they are an exercise of the war powers of the government and not an exercise of its sovereign or municipal power; that consequently they are not in conflict with the restrictions of the 5th and 6th Amendments to the Constitution.

2. In *Tyler vs. Defrees*, 11 Wall. 331 (1870), which was an action of ejectment to recover certain real property in the city of Washington, the same having been confiscated and sold under the Confiscation Act of July 17, 1862, the Supreme Court of the United States held that the Congress of the United States is not restricted in the exercise of the great war powers confided to it to a foreign power, but may equally exercise those powers in case of domestic insurrection and internal civil war.

3. In *Texas vs. White*, 7 Wall. 700 (1868), which was an original bill before the Supreme Court of the United States to secure the return to the State of Texas of certain United States bonds, the property of that State, the same having been illegally disposed of during the Civil War by the insurrectionary government thereof, the Court held that authority to suppress rebellion in a state, and to reestablish loyal state governments when former governments have been subverted or overthrown, is derived from the authority of Congress to suppress insurrection and carry on war (Const., Art. I, Sec. 8), and the obligation of the United States to guarantee to every State in the Union a republican form of government (Const., Art. IV, Sec. 4).

4. *Hamilton vs. Dillin*, 21 Wall. 73 (1874). On July 13, 1861, Congress passed an act authorizing the President to declare by proclamation that certain States were in insurrection, whereupon all commercial intercourse between such States and the loyal States was to cease, except as the same might be authorized by the President and conducted pursuant to regulations prescribed by the Secretary of the Treasury. The proclamation was accordingly issued by the President and various regulations and revisions there-

of were from time to time thereafter published by the Secretary. Certain relaxations from the strict rules of non-intercourse were made with the view of getting cotton, among other valuable products, from the territory of the Confederate States into that of the loyal States. One of the regulations in force provided for permits for the purchase of cotton by private individuals in enemy territory and for the transportation of same into loyal territory. A tax of 4 cents per pound was to be levied and collected on all the cotton so purchased and shipped in.

Among others, Hamilton, a citizen of Tennessee, obtained such permits from Dillin, surveyor at the port of Nashville, and shipped in a quantity of cotton during 1863 and 1864, on which he paid the required tax. Subsequently he sued to recover the amount so paid. His claim was that the exaction of 4 cents per pound was illegal and void; that it was essentially a tax and not authorized by Congress; that even if authorized it was unconstitutional and therefore void and that the payment was involuntary and no protest was necessary to recover.

The Supreme Court of the United States said in regard to this matter:

“There can be no question that the condition requiring the payment of 4 cents per pound for a permit to purchase cotton in and transport it from the insurrectionary States during the Civil War was competent to the war power of the government to impose. The war was a public one. The government in prosecuting it had at least all the rights which any belligerent has when prosecuting a war. That war itself was a suspension of commercial intercourse between opposing sections of the country. No cotton or other merchandise could be lawfully purchased in the insurrectionary States and transported to the loyal States without the consent of the government. If such a course of dealing were to be permitted at all, it would necessarily be upon such conditions as the government chose to prescribe. The war power vested in the government implied all this without any specific mention of it in the Constitution.

The Right to Establish Military Government

(a) The General Right

**The United States vs. Reiter
The United States vs. Louis
Provisional Court, State of Louisiana, 1865, Federal
Case 16,146**

Statement of the Case

August Reiter and John Louis had been tried separately before Judge Peabody and a jury, Reiter for murder of his wife and Louis for arson, and both were convicted. The cases came up in July, 1865, Judge Peabody being the judge of the Provisional Court for Louisiana, both judge and court having been appointed by act of the President of the United States, under date of October 20, 1862. At this time a state of war existed between the United States and the so-called Confederate States, and the former held Louisiana by means of its armed forces. The only civil court of law existing in the State at this time, was this court which had been established by the President, and before which in these cases, the accused men were indicted, tried and convicted under the law of the state of Louisiana.

After both men had been convicted a motion was made in each case in arrest of judgment, on the ground that the court was not authorized in law and had no jurisdiction to try either case.

The counsel for Reiter claimed that the court, in its constitution and creation, had not originally the

warrant of law to try the accused, while the counsel for Louis conceded that the court had authority originally to try the case, but insisted that for causes occurring since, its authority had ceased. These causes were, it was claimed, that certain steps had been taken in Louisiana toward the re-establishment of a civil state government that had superseded the Provisional Court in its authority.

The two cases of Reiter and Louis had nothing to do with each other with regard to facts but were handled together for convenience only.

THE POINTS OF LAW TO BE DECIDED

1st. "Whether the court has ever had, from the nature of its origin and constitution, authority to try cases like these; and if this question be decided in the affirmative it will remain to examine."

2d. "Whether the power to try or the jurisdiction over such a case, once possessed by this court, has been withdrawn or lost—whether the court in fact has been in any way deprived of it by subsequent events?"

OPINION OF THE COURT

Ordinarily, the judicial tribunals are created by Legislative Department either of the United States or of the several states, but this provisional court was the creation of the Executive Department. The President is, by the Constitution of the United States, commander-in-chief of the army and navy of the country and of the militia when called into the service of the United States, and does not, ordinarily, have the power of appointing or establishing judicial tribunals, but there was an unusual state of affairs in Louisiana at this time. The functions of the seceding government had stopped and armed Federal forces occupied the State. Law and order

had to be enforced, certainly, so a provisional tribunal was appointed by the President, with this object in view. The inhabitants of Louisiana had to be protected, crime had to be restrained and punished. It was manifestly the duty of the dominant power to afford this protection and to punish crime. The President, therefore, acted in obedience to his duty and in accordance with his right when he attempted to establish a tribunal capable of deciding controversies and administering justice.

The President had a precedent for his action in the case of *Cross versus Harrison* which was decided by the Supreme Court of the United States in 1853. The court held in that case:—

“That a civil government formed in California, under direction of the President of the United States, as commander-in-chief of the army and navy, shortly after the conquest of the country, and while it was held in military occupation by the forces under him, was an act warranted by the law of nations and that the formation of such a civil government was the rightful exercise of a belligerent over a conquered country.”

The President of the United States appointed a Provisional Government in California in 1846, and acting under that authority, the military governor at San Francisco, continued to collect import and tonnage duties as he had done before, and at the rates authorized by Congress in other parts of the United States. No Congressional legislation had been enacted, on the subject with regard to California, but the plaintiffs in the case of *Cross versus Harrison* argued that as a treaty of peace had been signed with Mexico, from whom we acquired California, that the military governor had no authority to collect duties, and that the civil authorities were the only ones competent to do so. The Supreme Court looked upon the matter in a broad light and decided

that the Provisional Government appointed by the President was a measure fully justified by the circumstances and that its actions rightfully continued until Congress legislated otherwise.

Another case bearing on this subject was that of *Leitensdorfer versus Webb*, decided in 1857 by the Supreme Court of the United States, the decision being that,

“A conqueror in a conquered country may establish a government and courts for the administration of justice.”

General Kearney was in command of the military forces of the United States in New Mexico after that country had been conquered, and he established a government and provisional courts for the administration of justice. It was claimed by the plaintiff in the case, that as soon as the territory had been ceded to the United States by Mexico, and the treaty of peace signed, that the government established by General Kearney was no longer legal. The Supreme Court, however, held otherwise, deciding that the provisional government was legally competent to act until Congress legislated on the subject.

Two other cases decided by the Supreme Court and affirming the same principles, were those of *Jecker versus Montgomery*, in 1854, and the *United States versus Rice* which grew out of the war between the United States and England in 1812.

The President, had, then, several clearly established precedents to follow when he appointed the Provisional Court for Louisiana in 1862. The necessity had been made clearly apparent for a provisional government in those territories which were held under military occupation and about which no legislation had yet been enacted by Congress. The actions of the provisional governments in the four

cases cited, had been held by the Supreme Court to be legal and binding, and therefore, the actions in the cases of Reiter and Louis along those lines, were fully authorized.

Judge Peabody in his final summing up of the case, said that his conclusion was as follows:—

“That at the time of the establishment of the provisional court for Louisiana, a considerable part of the territory of that state was held by the forces of the United States, in armed belligerent occupation. That in a country so held, the authority of the occupying force is paramount, and necessarily operates to the exclusion of all other independent authority in it. That government from some source is a necessity, and while the power to give and administer government is exclusively with a party occupying a country, there can be no doubt that the right and duty are his to furnish a government and supply that want. That the actual military occupation of that territory by the United States has continued from that time to the present, and still continues, and the right and duty of government, therefore, continue with the United States. That the establishment of the provisional court for Louisiana, by the President, as commander-in-chief of the forces of the United States, while they held the territory in which it was to exercise its functions, was an act warranted by the law of nations. That so long as the authority of the United States shall continue, the to afford to the country government, will con-right and duty of it, as the party dominant there tinue. That said court has, from the time of its foundation to the present time, rightfully exercised its functions in territory in which the government of the United States has been by force of its arms sovereign, and will continue rightfully to exercise them there, so long as its commission shall remain unrevoked, and the power of the United States shall continue to support it in the exercise of them”.

Cases Cited by the Court in Support of its Decision

1. The Grapeshot, 9 Wall. (76 U. S.) 129.
2. Cross vs. Harrison, 16 Howard (57 U. S.) 164.
3. Leitensdorfer vs. Webb, 20 Howard (61 U. S.) 176.
4. Jecker vs. Montgomery, 14 Howard (55 U. S.) 498.
5. U. S. vs. Rice, 4 Wheat. (17 U. S.) 246.
6. U. S. vs. Hayward, Federal Case No. 15,336.
7. The Fama, 5 C. Rob. Adm. 106.
8. The Foltina, 1 Dod. 450.
9. 30 Hogsheads of Sugar, 9 Cranch (13 U. S.) 191.
10. U. S. vs. Vowell, 5 Cranch (9 U. S.) 368.
11. U. S. vs. Arnold (Case No. 14,469), 9 Cranch (13 U. S.) 106.
12. Empson vs. Bathrust, Winch. 20, 50.

(b) The Nature of Military Governments

Thorington vs. Smith
Supreme Court of the United States, 1868, 8 Wallace 1

Statement of the Case

In November, 1864, Jack Thorington, of Montgomery, Alabama, sold to Smith & Hartley, also of Montgomery, a piece of land adjoining this city. Alabama was at this time occupied and controlled by the Confederate military and civil authorities whose center of organized government was at Richmond, Virginia.

Treasury notes issued by this government, which

were in general form and aspect like bank bills, formed the only currency in ordinary use. These notes contained a certificate by which the Confederate States of America promised to pay the bearer the sum named "two years after the ratification of a treaty of peace between the Confederate States and the United States of America."

The price agreed to be paid by Smith & Hartley for the land was \$45,000. Of this sum, \$35,000 were paid at the execution of the deed in Confederate States Treasury notes, and for the remainder a note was executed as follows:

Montgomery, November 28th, 1864.

\$10,000.

One day after date, we, or either of us, promise to pay Jack Thorington, or bearer, ten thousand dollars, for value received in real estate, sold and delivered by said Thorington to us this day, as per his deed of this date; this note, part of the same transaction, is hereby declared a lien or mortgage on said real estate situate and adjoining the city of Montgomery.

W. D. SMITH.
J. H. HARTLEY.

Confederate currency, of course, became worthless with the suppression of the rebellion and in 1867 Thorington brought suit in the District Court for the Middle District of Alabama for the enforcement of the lien, claiming the \$10,000 in United States money. The Court, finding that the note was made for payment in Confederate notes, took the view that the contract was illegal and dismissed the bill.

The case was then appealed to the Supreme Court of the United States. Chief Justice Chase delivered the opinion of the Court.

THE POINTS OF LAW TO BE DECIDED

"(1) Can a contract for the payment of Con-

federate notes, made during the late rebellion, between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States?

“(2) Can evidence be received to prove that a promise expressed to be for the payment of dollars was, in fact, made for the payment of any other than lawful dollars of the United States?

“(3) Does the evidence in the record establish the fact that the note for \$10,000 was to be paid, by agreement of the parties, in Confederate notes?”

OPINION OF THE COURT

“The first question is by no means free from difficulty. It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the government of the United States by insurrectionary force. Nor is it a doubtful principle of law that no contracts made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?

In examining this question, the state of that part of the country in which it was made must be considered.”

Referring to the government organized by the Confederate States, the Court continues:

“What was the precise character of this government in contemplation of law?

“It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* government will, we think, conduct us to a conclusion sufficiently accurate.

“There are several degrees of what is called *de facto* government.

“Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government.

"This is when the usurping government expels the regular authorities from their regular seats and functions, and establishes itself in their place, and so becomes the actual government of a country.

"An example may be found in the government of England under the Commonwealth, first by Parliament, and afterwards by Cromwell as Protector. It was not, in the contemplation of law, a government *de jure*, but it was a government *de facto* in the most absolute sense. It incurred obligations and made conquests which remained the obligations and conquests of England after the restoration. The better opinion doubtless is, that acts done in obedience to this government could not justly be regarded as treasonable; although in hostility to the king *de jure*.

* * * * *

"It is very certain that the Confederate government was never acknowledged by the United States as a *de facto* government in this sense. * * * From a very early period of the civil war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

"But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1), that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful government; and (2), that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered also, by civil authority, supported more or less directly by military force.

"One example of this sort of government is

found in the case of Castine in Maine, reduced to British possession during the war of 1812. * * * A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. * * * These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.

"The central government established for the insurgent States differed from the temporary governments at Castine and Tampico in the circumstance, that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think that it must be classed among the governments of which these are examples. * * * To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But, it made obedience to its authority, in civil and local matters, not only a necessity but a duty. Without such obedience, civil order was impossible.

"It was by this government exercising its power throughout an immense territory, that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, these notes were nullities; for except in that event there could be no payer. * * * While the war lasted, however, they had a certain contingent value, and were used as money in nearly all business transactions of many millions of people. They must be regarded therefore, as a currency, imposed on the community by irresistible force.

"It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this cur-

rency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency, cannot be regarded for that reason only, as made in the aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation. The first question, therefore, must receive an affirmative answer."

The second and third questions were also answered in the affirmative and the decree of the Circuit Court reversed, and the cause remanded for further hearing and decree.

Cases Cited

United States v. Rice, 4 Wheaton 253.

Fleming v. Page, 9 Howard 614.

NOTES

1. In *Leitensdorfer vs. Webb*, 20 Howard, 176 (1857), which was a proceeding in attachment to recover the amount due on a promissary note in New Mexico, the case being laid under a provision of the code adopted by the Military Governor during the military government of the country, the Supreme Court of the United States held that the executive authority of the United States properly established a provisional Government in New Mexico, which ordained laws and instituted a judicial system; all of which continued in force after the termination of the war, and until modified by the direct legislation of Congress, or by the territorial Government established by its authority.

2. In *Texas vs. White*, 7 Wallace 700 (1868), which was an original bill before the Supreme Court of the United States to secure the return to the State of Texas of certain United States bonds, the property of that State, the same having been illegally disposed of during the Civil War by the insurrectionary government thereof the Court held that officers of military governments instituted by the President as commander-in-chief during the rebellion and continued thereafter during reconstruction by Congress are to be recognized as properly representing the State in the prosecution of a suit before that Court; that the execution of the guaranty clause of the Constitution being primarily a legislative function residing in Congress, all acts of the President looking to the restoration of loyal State governments are provisional only.

3. In *The Venice*, 2 Wallace 258, (1864), which was a proceeding for the condemnation of certain property belonging to a British subject resident in New Orleans, the same having been captured on Lake Pontchartrain after the taking of the city, the Supreme Court of the United States held that two clauses in the proclamation initiating military government over New Orleans — "All the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States" and "All foreigners, not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States" — protected this particular property which otherwise would have been seizeable as enemy property. See page —.

4. In *Planter's Bank vs. Union Bank*, 16 Wallace 483 (1872), a proceeding to recover from the defendant a sum of money belonging to the plaintiff which had been paid over to the occupying military authorities on the order of the commanding general thereof after the issuance of a proclamation containing the clause, "All the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States," the Supreme Court of the

United States held that "as the war had not ceased, though it was not flagrant in the district, and as General Banks was in command of the district, it must be conceded that he had power to do all that the laws of war permitted, except so far as he was restrained by the pledged faith of his government, or by the effect of Congressional legislation. A pledge however had been given that rights of property should be respected. We do not assert that anything in General Butler's proclamation exempted property within the occupied district from liability to confiscation as enemies' property, if in truth it was such. All that is now said is that after that proclamation private property in the district was not subject to seizure as booty of war."

Temporary Allegiance of Inhabitants

The United States vs. Rice
Supreme Court of the United States, 1819, 4 Wheaton 246

Statement of the Case

On September 1, 1814, during the War of 1812, the British succeeded in subduing and occupying the town and harbor of Castine, Maine. This place was firmly held by them in military occupation until the close of the war, when, on April 27, 1815, it was evacuated and retaken possession of by the United States.

During the time that the British held the place they exercised civil and military jurisdiction over it, and while the town was thus held the firm of Upton & Adams, resident in Castine, imported a certain lot of goods into Castine, the duties thereon being paid to the collector of customs appointed by the British military government.

These goods on April 15, 1815, were sold to Henry Rice at Castine by the importers; and later, after the reestablishment of the American government over Castine, the collector of customs for that district claimed duty on the goods for the United States, the same as though they had been imported into the United States in foreign bottoms.

Rice had the goods entered with the collector, pursuant to the demand of the latter. Judgment was rendered for him in the Circuit Court of the United States, and the case was carried on a writ of error to the Supreme Court of the United States.

THE POINTS OF LAW TO BE DECIDED

1st.—Whether, in case of conquest and occupation by an enemy of a portion of the United States, our laws can apply to the occupied territory.

2d.—To what laws is an occupied territory subject?

3d.—In case the occupied territory is subsequently evacuated and reverts to American control, whether or not duties can be demanded on goods imported into the territory when it was held by the conquering and occupying power.

OPINION OF THE COURT

To the first point the Court decided as follows:

“By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors.”

As to the second point the Court said:

“By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British government chose to require.”

To the third point the court said:

“The goods were liable to American duties when imported, or not at all. That they were not so liable at the time of importation is clear from what has already been stated; and when, upon the return of peace, the jurisdiction of the United States was re-assumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretense to say that American duties could be demanded; and upon principles of public or municipal law, the cases are not distinguishable.”

NOTES

1. In *Leitensdorfer vs. Webb*, 20 How. 176 (1857), a proceeding in attachment to recover the amount due on a promissory note in New Mexico, the case being laid under a provision of the code adopted by the military governor during the military government of the country, the Supreme Court of the United States held that when New Mexico was conquered by the United States it was only the allegiance of the people that was changed; their relations to each other and their rights of property remained undisturbed. See page —.

Territorial Extent

NOTES

1. In the *Venice*, 2 Wallace 258 (1864) which was a proceeding for the condemnation of certain property belonging to a British subject resident in New Orleans, the same having been captured on Lake Pontchartrain after the taking of the city the Supreme Court of the United States says:—"The transports conveying the troops under the command of Major-General Butler, commanding the Department of the Gulf, arrived on the 1st of May and the actual occupation of the city was begun. There was no armed resistance but abundant manifestations of hostile spirit and temper both by the people and the authorities. The landing of the troops was completed on the 2d of May, and on the 6th a proclamation of General Butler, which had been prepared and dated on the 1st, was published in the newspapers of the city. There was no hostile demonstration and no disturbance afterwards; and we think that the military occupation of the city of New Orleans may be considered as substantially complete from the date of this publication: and that all of the rights and obligations resulting from such occupation, or from the terms of the proclamation, may be properly regarded as existing from that time." See p.—

2. In the *United States vs. Rice*, 4 Wheaton 246, (1819), where the question was as to whether goods which had been imported into Castine, Maine, during the time of the British occupancy, and duties paid thereon, were again chargeable with duties by the United States upon reoccupation of the territory,

the Supreme Court of the United States said that "by the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors."

Territory Militarily Occupied, Enemy Territory

Fleming versus Page

Supreme Court of the United States, 1850, 9 Howard 603

Statement of the Case.

On the 13th of May, 1846, the Congress of the United States declared that war existed with Mexico. On the 15th of November, 1846, the navy took military possession of Tampico, a seaport of Tamaulipas. On December 29th, military possession was taken of Victoria, the capital of Tamaulipas, and American garrisons established in many of the towns, which military occupation continued till the end of the war.

During 1847, the schooner Catherine, an American vessel chartered by the firm of Fleming & Marshall made two voyages from Philadelphia to Tampico and return. On the first voyage, she was cleared from the port of Tampico on the 13th of February, 1847, with a mixed cargo, the property of Fleming and Marshall, which was admitted into the port of Philadelphia free of duty. On the second voyage, the vessel returned to Philadelphia in June with a similar cargo, which Mr. Jas. Page, the collector of the port of Philadelphia, acting under instructions from the Secretary of the Treasury, refused to admit except on payment of duties as from a foreign port, not only for this voyage but for the previous one as well.

The plaintiffs paid the duties under protest, amounting to \$1529.00 and brought action for the recovery of the money so paid, in one of the state courts of Pennsylvania. In 1846 the case was taken to the Circuit Court of the United States for the

Eastern District of Pennsylvania, and was tried May Term, 1849, the jury finding for the plaintiffs.

A motion was made on behalf of the United States to set aside the verdict and for a new trial on certain stated grounds of error, and with a stated case submitted to the court for opinion. In deciding the case the Circuit Judges found themselves opposed in opinion on the question as to whether Tampico, while under military occupation by the forces of the United States, ceased to be a foreign country within the meaning of the current revenue laws, so that goods admitted from Tampico were entitled to enter duty free as from a domestic port.

Upon the certificate of division in opinion the case was taken to the Supreme Court.

THE POINTS OF LAW TO BE DECIDED

The particular point of law involved was whether a port did or did not become domestic territory within the meaning of the revenue laws by reason of military occupation.

This point was definitely decided in the negative by the Supreme Court, but as will be briefly set forth below several principles of wide general application were enunciated in addition, and a sharp distinction was made between the status of occupied territory in its relation to the United States and its status with regard to the governments of the world at large.

OPINION OF THE COURT

Mr. Chief Justice Taney delivered the opinion of the court, which was, in part as follows:

“ * * * And if at the time of this shipment Tampico was not a foreign port within the meaning of the act of Congress, then the duties were illegally charged, * * *

"The port of Tampico at which the goods were shipped, and the Mexican state of Tamaulipas, in which it is situated, were undoubtedly at the time of the shipment subject to the sovereignty and dominion of the United States. * * * But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the acts of Congress. * * *

"The United States, it is true, may extend its boundaries by conquest or treaty. * * * But this can be done only by the treaty making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duties and power are purely military. * * * His conquests do not enlarge the boundaries of this Union nor extend the operation of our institutions and laws beyond the limits before assigned them by the legislative power. It is true that when Tampico had been captured and the state of Tamaulipas subjugated, other nations were bound to regard the country while our occupation continued as the territory of the United States and to respect it as such. * * * As regarded all other nations it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

"But yet it was not part of the Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States * * * did not depend upon the law of nations, but upon our own Constitution and acts of Congress."

The opinion goes on to show that the occupation was simply that of a military commander in prosecution of a war, as a measure of military expediency, that the country was still hostile, the inhabitants still foreigners and enemies, and owing to the United States nothing more than temporary allegiance, that the boundaries of the United States were not nor could they be extended by the conquest, that every

place which was out of the limits of the United States as previously fixed by the political authorities of the government, was still foreign, and that Tampico was therefore a foreign port when the shipment was made.

The opinion further shows that the custom house at Tampico was not established by act of Congress, nor was the appointment of a collector so authorized, but that these were acts of war strictly and solely, and that the permit and coasting manifest issued by the military collector could not be recognized as the documents required by act of Congress when the vessel is engaged in the coasting trade, nor could they exempt the cargo from the payment of duties. Precedents for this portion of the opinion were given as follows: Decisions of the Treasury Department in the case of Pensacola at the time of the cession of Florida, and in the case of Baton Rouge and other ports at the time of the Louisiana purchase.

A great mass of cases was referred to in the argument of counsel; the court disposes of it as follows:

"We do not propose to comment upon the different cases cited in the argument. It is sufficient to say that there is no discrepancy between them. And all of them so far as they apply, maintain that under our revenue laws every port is regarded as a foreign one unless the custom house from which the vessel clears is within a collection district established by act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States."

The opinion states that in the view of the question taken by the court, the writings of eminent writers on the law of nations, and also the English decisions referred to by counsel need not be given undue consideration, adding

“Our own Constitution and form of government must be our only guide. And we are entirely satisfied that under the Constitution and laws of the United States, Tampico was a foreign port, within the meaning of the Act of 1846, when these goods were shipped, and that the cargoes were liable to the duty charged upon them. And we shall certify accordingly to the Circuit Court.”

Mr. Justice McLean dissented.

Cross vs. Harrison

Supreme Court of the United States, 1853, 16 Howard 164

Statement of the Case

This case came up by writ of error from the Circuit Court of the United States for the Southern District of New York.

Cross, Hobson & Co. brought an action of assumpsit to recover back from Harrison moneys paid to him while acting as collector of customs at the port of San Francisco, in California, for tonnage on vessels and duties on merchandise, not of the growth, produce or manufacture of the United States, imported by the plaintiffs from foreign places into California and there landed between February 3, 1848, and November 12, 1849.

This period of time was subdivided by the plaintiffs into three portions, to each of which they supposed different rules of law attached. The three periods may be stated as follows:

3d of February, 1848, the date of the treaty of peace between the United States and Mexico.

3d of March, 1849, when the act of Congress was passed, including San Francisco within one of the collection districts of the United States.

13th of November, 1849, when Collector Collier, a person who had been regularly appointed collector at the port of San Francisco, entered upon the duties of his office.

Up to the 3d of February, 1848, a war tariff prescribed by the Commander of the naval forces of the United States on the Pacific station, under the in-

structions of the President, was collected by army and navy officers.

On the 26th of July, 1848, after the signing and ratification of the treaty of peace, but before notification thereof was received in California, Colonel Mason, Military Governor of California, issued a number of regulations for the government of the custom house among which were two imposing forfeitures on the master of a vessel or other person attempting to land dutiable goods without the permit of a collector.

On the 7th of August, 1848, Governor Mason issued a proclamation to the people of California announcing the ratification of the treaty of peace by which California was ceded to the United States.

On the 9th of August, 1848, H. W. Halleck, Lieutenant of Engineers and Secretary of State, wrote to Captain Folsom, the Collector of Customs at San Francisco, directing him to perform the duties until further orders but announcing that he would be relieved as soon as some suitable citizen could be found to be appointed to be his successor. In the meantime he was told that the tariff of duties for the collection of military contributions would immediately cease and the revenue laws and tariff of the United States would be substituted in its place.

On the 3d of September, 1848, Governor Mason appointed Edward H. Harrison temporary collector of the port of San Francisco. He continued in office until Collector Collier relieved him.

On the 23d of February, 1849, Cross, Hobson & Co. protested against the payment of \$105.62, duties which accrued upon an importation by the French bark Staonele, and also protested against the payment of duties upon all other importations, past, present or to come.

The views of the Executive Department of the

Government of the United States as to the government of California were somewhat uncertain. The President believed that the condition of the people of California, after the ratification of the treaty of peace, was anomalous, the military government established over them during the war having ceased to derive its power from belligerent right but, being a government *de facto* and in operation, would have to continue with the presumed consent of the people until Congress should otherwise direct, no other possible course being open. The Secretary of the Treasury thought that goods already in California should be admitted free of duty into the rest of the United States and vice versa; that, although the Constitution of the United States extended to California yet it was not brought within the limits of any collection district nor had Congress provided for the appointment of any officers for the collection of duties therein; that, although the Treasury Department might not be able to collect the duties accruing on foreign goods imported into California, yet should attempts be made to bring such goods into other ports or places of the United States they would there be subject to all duties and penalties. The Military Governor of California was, therefore, left largely to his own devices in adopting a course of action that would be at once legal and proper.

OPINION OF THE COURT

1. As to the collection of duties during the period ending February 3, 1848:

(Referring to the letter of the Secretary of War to General Kearney, the first military governor of California, of the 10th of May, 1847, which was accompanied with a tariff of duties on imports and tonnage.) "No one can doubt that these orders of the President and the action of our army and navy

commanders under them was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations.

"The plaintiffs, therefore, can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. Until that time California had not been ceded, in fact, to the United States, but it was conquered territory, within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandise, they were paid under them."

2. As to the right of plaintiffs to have restored the duties which were paid between the ratification and exchange of the treaty of peace and the notification of that fact by our government to the military governor of California:

"But after the ratification of the treaty California became a part of the United States, or a ceded, conquered territory. The notification of the fact of ratification was not received by the military governor until two months after it had taken place, and not then with any instructions or even remote intimation from the President that the civil and military government, which had been instituted during the war, was discontinued. Up to that time whether such an intimation had or had not been given, duties had been collected under the war tariff, strictly in conformity with the instructions which had been received from Washington.

"It will certainly not be denied that those instructions were binding upon those who administered the civil government in California until they had notice from their own government that a peace had been finally concluded. * * * Or that anyone could claim a right to introduce into the territory of that government foreign merchandise, without the payment of duties which had originally been imposed under belligerent right, because the territory had

been ceded by the original possessor and enemy to the conqueror. Or that the mere fact that the territory had been ceded by one sovereignty to another opens it to a free commercial intercourse with all the world, as a matter of course, until the new possessor has legislated some terms upon which that may be done. There is no such commercial liberty known among nations and the attempt to introduce it in this instance is resisted by all those considerations which have made foreign commerce between nations conventional. "The treaty that gives the right of commerce is the measure and rule of that right." (Vattel, chap. 8, sec. 43.) The plaintiffs in this case could claim no privilege for the introduction of their goods into San Francisco between the ratification of the treaty with Mexico and the official announcement of it to the civil government in California other than such as that government permitted under the instructions of the government of the United States."

3. As to the right of the plaintiffs to a restoration of the duties paid from the time when the official notification of the ratification of the treaty of peace was made in California to the time when the revenue system in respect to tonnage and duties had been put into practical operation in California under the act of Congress passed for that purpose:

"The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make needful rules and regulations for the territory and other property belonging to the United States, with the power also to admit new States into this union with only such limitations as are expressed in the section in which this power is given. The government of which Colonel Mason was the executive had its origin in the lawful exercise of a belligerent right over conquered territory. It had been instituted by command of the President of the United States. It was the government when the territory was ceded as a

conquest and it did not cease as a matter of course nor as a necessary consequence of the return of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both was that it was meant to be continued until it was legislatively changed. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in convention to form a state government, which was subsequently recognized by Congress under its power to admit new States into the Union. * * *

“Our conclusion, from what has been said, is that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest without any violation of the Constitution or laws of the United States, and that until Congress legislated for it, the duties upon foreign goods imported into San Francisco were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment according to instructions from Washington, from Governor Mason.”

The Court held that the rulings made in this case in the Circuit Court, to which exception had been made, were correct, and affirmed the judgment thereof.

Cases Cited

American Ins. Co. vs. Canter, 1 Peters 542, 543.
United States vs. Gratiot, 14 Peters 546.

De Lima vs. Bidwell

Supreme Court of the United States, 1900, 182 U. S. 1

Statement of the Case

Porto Rico was invaded by the military forces of the United States in July, 1898, and on August 12th of the same year a protocol was entered into between Spain and the United States, providing for a suspension of hostilities, the conclusion of a treaty of peace and the cession of the island. On December 10th the treaty of peace was signed at Paris, ratified by the President and Senate, February 6th, 1899, and by the Queen Regent of Spain, March 19th, 1899. On April 11th, the ratifications were exchanged and the treaty proclaimed at Washington. On April 12th, 1900, an act, commonly called the Foraker Act, was passed, to provide temporary revenues and a civil government for Porto Rico. This act took effect May 1st, 1900.

During the autumn of 1899, between the dates of the ratification of the Treaty of Paris and the passage of the Foraker Act, three cargoes of sugar, produced in Porto Rico and shipped from one of its ports, was consigned to De Lima & Company, New York merchants. The defendant, as collector of customs of the port of New York assessed duties to the amount of upwards of \$13,000 on these sugars which the plaintiffs paid under protest in order to gain possession of them.

An action was thereupon instituted by the plaintiffs against the collector of the port of New York in the Supreme Court of the State of New York, to re-

cover back these duties alleging that they had been illegally exacted and only paid under formal protest.

Upon the petition of the collector and pursuant to Rev. Stat. sec. 643 the case was removed by *certiorari* to the Circuit Court of the United States for the Southern District of New York. In this court the defendant appeared and demurred to the complaint upon the grounds: First, That the complaint did not state a cause for action; Second, That the court had no jurisdiction of the case. Mr. Justice Cox of this court sustained the demurrer upon both grounds and dismissed the action.

The plaintiffs then carried the case to the Supreme Court of the United States where it was heard in the October term, 1900.

THE QUESTION OF LAW

Whether the cargoes of sugar in question were subject to duty depends solely upon the question whether Porto Rico was a "foreign country" within the meaning of the revenue laws at the time the sugars were shipped.

A question of jurisdiction also arose which is not taken up here since it has no bearing upon the subject of military government.

OPINION OF THE COURT

The tariff act of July 24th, 1897, commonly known as the Dingley Act, declares, that "there shall be levied, collected and paid upon all articles imported from foreign countries" certain duties therein specified.

A foreign country was defined by Mr. Chief Justice Marshall and Mr. Justice Story to be one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States. (The Boat Eliza. 2 Gall. 4; Taber vs. United

States, 1 Story 1; The Ship Adventure, 1 Brock 235, 241.)

“The status of Porto Rico was this: The island had been for some months under military occupation by the United States as a conquering country, when, by the second article of the treaty of peace between the United States and Spain, signed December 10th, 1898 and ratified April 11th, 1899, Spain ceded to the United States the island of Porto Rico, which has ever since remained in our possession, and has been governed and administered by us. If the case depends solely upon these facts, and the question were broadly presented whether a country which had been ceded to us, the cession accepted, possession delivered and the island occupied and administered without interference by Spain or any other power, was a foreign country or domestic territory, it would seem that there could be little hesitation in answering this question. But it is earnestly insisted by the government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that while the island may be to a certain extent domestic territory, it still remains a foreign country under the tariff laws until Congress has embraced it within the general revenue system.”

The court stated that there are certain regulations of the executive departments which are supposed to favor this contention. It cited the case of *United States vs. Rice*, 4 Wheat. 246, in which the court held that a part of the territory of the United States temporarily in possession of the hostile British forces to be foreign country during such occupation; and called attention to the fact that in this case there was no cession.

The court quoted the opinion of Mr. Chief Justice Taney in the case of *Fleming vs. Page* (9 How. 603) —an action against the collector at Philadelphia to recover back duties upon merchandise imported from Tampico, in Mexico, during a temporary occupation

of that place by the United States, where it was held:

"The United States, it is true, may extend its boundaries by conquest and treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty making power of the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. While Tampico was occupied by our troops, they were in an enemy's country, and not in their own."

In this case the decision of the court was that, although Tampico was within the military occupation of the United States, it had not ceased to be a foreign country, in the sense in which these words are used in acts of Congress.

It was pointed out that although these two cases above cited may not appear in harmony that they are, as a matter of fact, entirely consistent since:

"In the first case (United States vs. Rice) it was merely held that duties could not be collected upon goods brought into a domestic port during a temporary occupation by the enemy, though the enemy subsequently evacuated it, in the latter case (Fleming vs. Page) that the temporary occupation by the United States of a foreign port did not make it a domestic port, and that goods imported from that port into the United States were still subject to duty."

The court next cited the case of Cross vs. Harrison, 16 How. 164.

"This was an action in assumpsit to recover back moneys paid to Harrison while acting as collector of the port of San Francisco for tonnage and merchandise imported from foreign countries and upon which duties were levied, between the date of the ratification of the treaty of peace between the United States and Mexico and the date upon which the collector ap-

pointed by the President entered upon his duties.

"Plaintiff proceeded upon the theory that duties had never been held to accrue to the United States in her newly acquired territories until provision was made by an act of Congress for their collection; that the revenue laws had always been held to speak only as to the United States and its territories existing at the time when the several acts were passed, therefore until the collector had been appointed by the President, California was, and continued to be, after the date of the treaty a foreign territory, and hence no duties were payable as upon an importation into the United States.

"In holding that these duties were properly assessed Mr. Justice Wayne, cited a dispatch from Mr. Buchanan, the Secretary of State, and a circular letter issued by the Secretary of the Treasury, holding that from the necessities of the case the military government established in California did not cease to exist with the treaty of peace, but continued as a government *de facto* until Congress should provide a territorial government.

"The court, in this case, held that after the ratification of the treaty of peace, California became a part of the United States, or a ceded, conquered territory, and that until Congress legislated for it, the duty upon foreign goods imported into California were legally demanded and legally received by Mr. Harrison. The opinion is quite a long one, and establishes the three following propositions:—(1) That under the war power the military governor of California is authorized to prescribe a scale of duties upon importations from foreign countries to San Francisco, and to collect the same through a collector appointed by himself, until the ratification of the treaty of peace. (2) That after such ratification duties were legally imposed under the tariff laws of the United States which took effect immediately. (3) That the civil government established in California continued from the necessities of the case until Congress provided a territorial government.

"It will be seen that the three propositions involve a recognition of the fact that California became domestic territory immediately after the ratifi-

cation of the treaty, or, to speak more accurately, as soon as this was officially known in California.

"The doctrine that a port ceded to and occupied by us does not lose its foreign character until Congress has acted, and a collector appointed was distinctly repudiated with the apparent acquiescence of Chief Justice Taney, who wrote the opinion in *Fleming v. Page* and still remained the Chief Justice of the court. The question does not involve directly the question at issue in this case; whether goods carried from a port in a ceded territory directly to New York are subject to duties, since the duties in *Cross vs. Harrison* were exacted upon foreign goods imported into San Francisco as an American port; but it is impossible to escape the logical inference from that case that goods carried from San Francisco to New York after the ratification of the treaty of peace would not be considered as imported from a foreign country."

The court stated that the practice and rulings of the executive departments with respect to the status of newly acquired territories prior to such status having been settled by Congress, is, with a single exception, strictly in line with the decision in the case of *Cross vs. Harrison*.

"Between the date that the United States took possession of Louisiana and the date on which Congress passed an act taking Louisiana into the customs union Mr. Gallatin, the Secretary of the Treasury, sent a circular letter to the customs collector at New Orleans and other collectors in this territory, informing them that the collection of duties would be carried on under the old Spanish schedule, without change. It is evident from his instructions that the Secretary of the Treasury considered Louisiana foreign territory until Congress had specifically taken it into the customs union. This position is manifestly inconsistent with the position taken by the Supreme Court of the United States in the case of *Cross vs. Harrison*."

In the case of *The Fama*, 5 Ch. Rob. 97, the

question being one of duties charged on shipments of goods from the port of Florida in possession of the United States before an act extending the revenue laws to Florida had been passed, Mr. Wirt, the Attorney General, took the view that the Floridas ceased to be a foreign country upon a delivery of possession under the treaty of cession.

Between the date on which Congress adopted the joint resolution consenting to the annexation of Texas upon certain conditions and the date on which it was formally admitted as a State the Secretary of the Treasury directed a circular letter to his collectors directing collections on all imports from Texas to the United States until Congress should act further. The court considered this circular letter as of no pertinence to the question here involved since "of course there could be no question that Texas remained a foreign state until she was formally admitted."

After the treaty of cession under which California came into the possession of the United States, and before Congress passed the act including California within one of the collection districts, the Secretary of State, Mr. Buchanan stated in an official letter "this government de facto will, of course, exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land."

* * * * *

For this reason no duties can be levied in California on articles from the United States * * for the obvious reason that California is within the territory of the United States.

The Secretary of the Treasury carried out Mr. Buchanan's ideas in a circular letter directed to his collectors in which he too takes the view that California is not foreign country within the meaning of the revenue laws.

Between the date of delivery of possession to the United States by Russia of Alaska and the date of the act of Congress extending the revenue laws to this territory it was held by the Secretary of the Treasury and the Secretary of State that Alaska became a part of the United States, and, as such was not a "foreign country" within the meaning of the tariff and revenue laws.

The Court then said:—

"As showing the construction put upon this question by the legislative department, we need only to add that Sec. 2 of the Foraker act makes a distinction between foreign country and Porto Rico, by enacting that the same duties shall be paid upon "all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from foreign countries.

"From the résumé of the decisions of this court, the instructions of the executive departments, and the above act of Congress, it is evident that, from 1803, the date of Mr. Gallatin's letter, to the present time, there is not a shred of authority, except the dictum in *Fleming and Page* (practically overruled in *Cross vs. Harrison*), for holding that a district ceded to, and in the possession of the United States remains for any purpose a foreign country. Both these conditions must exist to produce a change of nationality for revenue purposes. Possession is not alone sufficient, as was held in *Fleming vs. Page*; nor is a treaty ceding such territory sufficient without a surrender of possession. (*Keene vs. McDonough*, 8 Pet. 308; *Pollard's Heirs vs. Kibbe*, 14 Pet. 353, 406; *Hallett vs. Hunt*, 7 Ala. 882, 899; *The Fama*, 5 Ch. Rob. 97.) The practice of the executive departments thus continued for more than half a century, is entitled to great weight, and should not be disregarded nor overturned except for cogent reasons, and unless it be clear that such construction be erroneous. (*United States vs. Johnston*, 124 U. S. 326, and other cases cited.)

"But were this presented as an original question we should be impelled irresistibly to the same conclusion."

The court here cited opinions of the Supreme Court of the United States in several cases to the effect that under the Constitution a treaty is as binding upon the rights of litigants, and as much to be regarded by the courts as an act of Congress and that territory acquired by a treaty of cession is as absolutely acquired as though the annexation had taken place in accordance with an act of Congress — as was the case with Texas and Hawaii.

"It follows from this that by the ratification of the treaty of Paris, the island became territory of the United States — although not as an organized territory in the technical sense of the word. * * * Territory once acquired by treaty, belongs to the United States, and is subject to the disposition of Congress.

"Territory thus acquired can remain foreign country under the tariff laws only upon one of two theories: Either that the word 'foreign' applies to such countries as were foreign at the time the statute was enacted, notwithstanding any subsequent change in their condition, or that they remained foreign under the tariff laws until Congress has formally embraced them within the customs union of the States.

"The first theory is obviously untenable. While a statute is presumed to speak from the time of its enactment it embraces all such persons and things as subsequently fall within its scope.

"The second theory presupposes that a country may be domestic for one purpose and foreign for another. We are unable to acquiesce in this assumption."

The court called attention to the fact that this action had been brought eleven days before the act of Congress appropriating the customs revenues received from duties on shipments between the United

States and Porto Rico, therefore that even if that act were construed as a recognition by Congress of the right to collect duties from Porto Rico as though from a foreign country, and a recognition of the fact that Porto Rico continued to be a foreign country until Congress extended the revenue laws to include it, that it had no bearing upon the questions at issue since Congress could not by a subsequent act deprive the plaintiffs of the right to prosecute this action. That this act of Congress should not be interpreted in such a way as to make it retroactive see Kenneth's Petition, 24 N. H. 139.

DECISION OF THE COURT

"We are therefore of the opinion that at the time these duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws but a territory of the United States; that the duties were illegally exacted and that the plaintiffs are entitled to recover them back."

Cases Cited by the Court

The Boat Eliza, 2 Gall. 4.
Taber vs. United States, 1 Story 1.
The Ship Adventure, 1 Brock. 235, 241.
United States vs. Rice, 4 Wheat. 246.
Fleming vs. Page, 9 How. 693.
Cross vs. Harrison, 16 How. 164.
Keene vs. McDonough, 8 Pet. 308.
Pollard's Heirs vs. Kibbe, 14 Pet. 353, 406.
United States vs. Johnston, 124 U. S. 236.
The Peggy, 1 Cranch 103, 110.
The Fama, 5 Ch. Rob. 97.
Hallett vs. Hunt, 7 Ala. 882, 899.
Kenneth's Petition, 24 N. H. 139.
Alter's Appeal, 67 Penn. St. 341.
Norman vs. Heist, 5 W. & S. 171.
Donoval vs. Pitcher, 53 Ala. 411.
Palairot's Appeal, 67 Penn. St. 479.
State vs. Warren, 28 Maryland 338.

Dooley vs. United States

Supreme Court of the United States, 1900, 182 U. S. 222

Statement of the Case

Dooley, Smith & Company was a firm engaged in trade and commerce between Porto Rico and New York. They began an action in the Circuit Court, as a Court of Claims, to recover certain duties, amounting to over \$5,000.00, exacted and paid under protest upon several consignments of merchandise imported into Porto Rico from New York between July 26, 1898, and May 1, 1900, viz.:

(a) From July 26, 1898, until August 19, 1898, under the terms of the proclamation of General Miles, directing the exaction of the former Spanish and Porto Rico duties.

(b) From August 19, 1898, until February 1, 1899, under the customs tariff for Porto Rico, proclaimed by order of the President.

(c) From February 1, 1899, to May 1, 1900, under the amended tariff customs promulgated January 20, 1899, by order of the President.

It appears, then, that the duties were collected partly before and partly after the ratification of the treaty, but in every case prior to the taking effect of the Foraker act.

The revenues thus collected were used by the military authorities for the benefit of the provisional government.

POINTS OF LAW TO BE DECIDED

- (1) Were the duties upon imports from the

United States to Porto Rico collected by the military commander and by the President as commander-in-chief, from the time possession was taken of the island until the ratification of the treaty of peace, legally exacted under the war power?

(2) When did the right to exact duties upon importations from Porto Rico to New York and the correlative right to exact duties upon imports from New York to Porto Rico cease?

OPINION OF THE COURT

(1) In their legal aspects, the duties exacted in this case were of three classes:

1. The duties prescribed by General Miles under order of July 26, 1898, which merely extended the existing regulations.

2. The tariffs of August 19, 1898, and February 1, 1899, prescribed by the President as commander-in-chief, which continued in effect until April 11, 1899, the date of the ratification of the treaty and the cession of the island to the United States.

3. From the ratification of the treaty to May 1, 1900, when the Foraker act took effect.

1. There can be no doubt with respect to the first two of these classes, namely, the exaction of duties under the war power, prior to the ratification of the treaty of peace. While it is true the treaty of peace was signed December 10, 1898, it did not take effect upon individual rights until there was an exchange of ratifications.

Upon the occupation of the country by the military forces of the United States, the authority of the Spanish government was superseded, but the necessity for a revenue did not cease. The government must be carried on and there was no one left to administer its functions but the military forces of the United States. Money is requisite for that purpose, and money could only be raised by order of the military commander. The most natural method was by the continuation of existing duties.

The United States and Porto Rico were still foreign countries with respect to each other. Not-

withstanding the military occupation of the United States, Porto Rico remained a foreign country within the revenue laws.

2. Different considerations apply with respect to duties levied after the ratification of the treaty and the cession of the island to the United States. Porto Rico then ceased to be a foreign country, and, as we have held in *De Lima vs. Bidwell*, the right of the collector of New York to exact duties upon imports from that island ceased with the exchange of ratifications. We have no doubt, however, that from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty, and until further action by Congress. At the same time, while the right to administer the government continued, with the conclusion of the treaty of peace and cession of the island to the United States, Porto Rico ceased to be a foreign country and the right to collect duties upon imports from that island ceased.

In legislating for a conquered country the conqueror may disregard the laws of that country, but he is not wholly above the laws of his own. Without questioning at all the original validity of the order imposing duties upon goods imported into Porto Rico from foreign countries, we think the proper construction of that order is that it ceased to apply to goods imported from the United States from the moment the United States ceased to be a foreign country with respect to Porto Rico and that until Congress otherwise constitutionally directed, such merchandise was entitled to free entry.

List of Cases Cited

- Haver vs. Yaker, 9 Wall. 32.
- Fleming vs. Page, 9 How. 603.
- Halleck on International Law, Vol. II, p. 144.
- New Orleans vs. Steamship Co., 20 Wall. 387-393.
- Thirty Hogsheads of Sugar vs. Boyle, 9 Cr. 191.
- Fleming vs. Page, 9 How. 603.
- American Ins. Co. vs. Canter, 1 Pet. 511.
- Cross vs. Harrison, 16 How. 164.

The Grapeshot, 9 Wall. 129-133.
Mitchell vs. Harmony, 13 How. 115.
Mostyn vs. Fabrigas, 1 Cowp. 161.
Raymond vs. Thomas, 91 U. S. 712.
De Lima vs. Bidwell.
Downes vs. Bidwell.

Santiago vs. Nogueras

Supreme Court of the United States, 1909, 214 U.S. 260

Statement of the Case

The plaintiffs in error brought in the District Court of the United States for Porto Rico an action for the recovery of certain parcels of land held by the defendants in error. There was judgment for the defendants in the court below and the case is here upon writ of error.

One of the plaintiffs once owned the lands in dispute but they were sold upon an execution issued upon a judgment rendered against him by the United States Provisional Court. The defendants hold the title by the execution sale. The plaintiffs attack the title solely upon the grounds that the United States Provisional Court had no lawful existence, and if lawfully constituted was entirely without jurisdiction to render the judgment which it did and that for one reason or the other the judgment is a nullity everywhere.

The ratifications of the treaty of peace by which Porto Rico was ceded to the United States were exchanged April 11, 1899. The act of Congress establishing a civil government in Porto Rico, passed April 12, 1900, took effect on May 1st of that year. Between these two dates, on June 27, 1899, the United States Provisional Court, here in question, was established by military authority, with the approval of the President, by General Order 88, series of 1899. At the time this order was issued peace prevailed in Porto Rico and the courts established under the Spanish sovereignty were open.

The plaintiffs contend that the military power,

acting under the authority of the President, as Commander in Chief, does not warrant the creation of the United States Provisional Court.

THE QUESTIONS OF LAW

1. Did the military government in Porto Rico at the time of the ratification of the treaty of peace continue until superseded by the organic act; had it power to establish the United States Provisional Court; did that court have jurisdiction to render the judgment involved in this case?

2. Under the provision of the order establishing the Provisional Court of Porto Rico that it have jurisdiction of controversies between different states and foreign states, did it have jurisdiction of a controversy between a subject of Spain and a resident of Porto Rico?

OPINION OF THE COURT

1. "By the ratification of the treaty of peace, Porto Rico ceased to be subject to the crown of Spain and became subject to the legislative power of Congress. But the civil government of the United States cannot extend immediately and of its own force over conquered and ceded territory. Theoretically Congress might prepare and enact a scheme of civil government to take effect immediately upon the cession, but, practically, there always have been delays and there always will be. Time is required for a study of the situation and for the maturing and enacting of an adequate scheme of civil government. In the meantime, pending the action of Congress, there is no civil power, under our system of government, not even of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that, under such circumstances, there must be an

interregnum? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander in Chief. In the case of *Cross vs. Harrison*, 16 Howard 164, a situation of this kind was referred to in the opinion of the court, where it said:—‘It (the military authority) was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it but that was not done. The right inference from the inaction of both, is that it was meant to be continued until it was legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government.’

“The authority of the military government during the period between the cession and the action of Congress, like the authority of the same government before the cession, is of large, though it may not be of unlimited, extent. In fact, certain limits, not material here, were put upon it in *Dooley vs. United States* and *Lincoln vs. United States*, though it was said in the *Dooley* case:—“We have no doubt however that from the necessities of the case the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty and until further action by Congress.’

“But whatever may be the limits of the military power, it certainly must include the authority to establish courts of justice which are so essential a

part of any government. With this thought in mind the military power not only established this particular court in Porto Rico, but as well a system of courts, which took the place of the courts under the Spanish sovereignty, and were continued by the organic act. The same course was pursued in the Philippine Islands."

2. "A further contention of the plaintiffs is that the United States Provisional Court was without jurisdiction because the diversity of citizenship made requisite by the order did not exist. Assuming, without deciding, that this question is open at this time, we are of the opinion that the citizenship of the parties to the action in the United States Provisional Court was such as to give that court jurisdiction. The plaintiff there was a Spanish subject and the defendant a citizen and resident of Porto Rico. Taking the second and the tenth paragraphs (of the order establishing the court) into consideration and the classes of persons enumerated in paragraph 8, which included 'foreigners', there can be no doubt that the case was within the jurisdiction which the order sought to confer. In view of the whole order, we think that a controversy between a Porto Rican and a Spaniard furnished the diversity of citizenship which the order made jurisdictional. Undoubtedly one of the main purposes of the establishment of this court was to afford a court where Spanish subjects could obtain justice against Porto Ricans at a time when it might be feared that the embers of the old disputes between Spaniards and Porto Ricans were still aflame.

"We are of the opinion that the judgment of the United States Provisional Court was not a nullity and that the sale on execution, under which the defendant's claim, conveyed to them a good title. As the court below took the same view, its judgment is affirmed."

Cases Cited

Cross vs. Harrison, 16 How. 164, 193, 194.

Leitensdorfer vs. Webb, 20 How. 176.

Opinion of Mr. Justice Gray in Downes vs. Bidwell, 182 U. S. 244, 345.

Dooley vs. United States, 182 U. S. 222, 234.

Lincoln vs. United States, 197 U. S. 419.

Section 34 of the Organic Act, 31 Stat. 77.

NOTES

1. In *Fourteen Diamond Rings vs. United States*, 183 U. S. 176 (1901), where Emil J. Pepke, a soldier in the 1st Dakota Regiment of Infantry, U. S. Volunteers, brought back to the United States from the Philippine Islands fourteen diamond rings which he had secured by purchase or through a loan subsequent to the ratification of the treaty of peace and the promulgation thereof by the President in those islands, which rings were in May, 1900, seized in Chicago, Illinois, by a customs officer as having been imported contrary to law without entry, declaration or payment of duties and an information filed for the forfeiture thereof, the Supreme Court of the United States held, as in *De Lima vs. Bidwell*, 182 U. S. 1, that these goods, having been imported after the cession of the Islands to the United States by Spain, were not subject to the duties imposed by the Act of Congress of 1897 on "articles imported from foreign countries".

In answer to a contention by the Government that the application of the principle to the Philippines should be distinguished from its application in the case of *Porto Rico* because on February 14, 1899, after the ratification of the treaty, the Senate resolved that it was not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States nor to permanently annex those islands, the Court said that the meaning of a treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it.

In answer to a further contention by the Government that a distinction existed in that while

complete possession of Porto Rico was taken by the United States this was not so as to the Philippine Islands because of the armed resistance of the native inhabitants to a greater or less extent, the Court said that it must decline to assume that the Government wished thus to disparage the title of the United States or to place itself in the position of waging a war of conquest. The fact that there were insurrections against Spain or that uncivilized tribes may have defied her will did not affect the validity of her title. She granted the Islands to the United States and the grantee in accepting them took nothing less than the whole grant.

2. In the American Insurance Company vs. Canter, 1 Peters 511 (1828) where the question was as to whether the territorial courts of the Territory of Florida, organized under acts of the territorial legislature, had authority to determine matters of salvage, the Supreme Court of the United States says that the usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined by the treaty of peace; if it be ceded by treaty, the acquisition is confirmed and the ceded territory becomes part of the nation to which it is annexed; either on the terms stipulated in the treaty or on such as its new master shall see fit to impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change; their relations with their former sovereign are dissolved and new relations are created between them and the sovereign who has acquired their territory; the same act which transfers their territory, transfers the allegiance of those who remain in it and the law which may be denominated political is necessarily changed; although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

Effect of Occupation on Local Administration

NOTES

1. In *United States vs. Rice*, 4 Wheaton 246 (1819), where the question was as to whether goods which had been imported into Castine, Maine, during the time of the British occupancy, and duties paid thereon, were again chargeable with duties by the United States upon reoccupation of the territory, the Supreme Court of the United States held that the inhabitants of occupied territory are bound by such laws, and such only, as the occupying power chooses to recognize and impose and that goods, imported into the occupied territory during the occupation, not being liable to duties of the original sovereign at time of importation, are in the same predicament, upon the reoccupation of the territory by the original sovereign, as if that territory had been ceded to it by treaty, i. e. — the goods are not dutiable.

2. In *Leitensdorfer vs. Webb*, 20 Howard 176 (1857), which was a proceeding in attachment to recover the amount due on a promissary note in New Mexico, the case being laid under a provision of the code adopted by the Military Governor during the military government of the country, the Supreme Court of the United States decided that, on account of the military occupation, the former political relations of the inhabitants were dissolved but that their private relations, their rights vested under the government of their former allegiance or those arising under contract or usage, remained in full force and unchanged; except so far as they were in their nature found to be in conflict with the Constitution or laws of the United States or with any regulations which the occupying and conquering authority should ordain; that there was no question that during the period of their valid existence and operation, the

code and ordinances adopted by the conqueror for the government of the country displaced and superseded every previous institution of the vanquished and deposed political power which was incompatible with them.

3. In *Dow vs. Johnson*, 100 U. S. 158 (1879), which was a suit against General Neal Dow of the United States Army to recover the value of some property seized by his command from a resident of the vicinity while he was stationed at Fort St. Philip, below New Orleans, in 1862, the Supreme Court of the United States said, in effect, that, upon an invasion, the political relations of the people of such invaded country to their former government are, for the time, severed. But that for their protection and benefit and for the protection and benefit of others not in the military service, the municipal laws affecting private rights of persons and property, and providing for the punishment of crime, are generally allowed to continue in force and to be administered by the ordinary tribunals as before the occupation; that they are considered as continuing unless suspended or superseded by the occupying belligerent. Further, that a municipal court of the conquered country, allowed to continue in the performance of its duties by the occupying belligerent, had no authority to adjudge the propriety or necessity of the exercise of the belligerent right of seizure and is without jurisdiction to render a judgment against an officer or soldier of the Army of the United States for acts done in the performance of a military duty.

4. In *Coleman vs. Tennessee*, 97 U. S. 509 (1878), where Coleman was tried by court martial for a murder committed in Tennessee in March 1865, and was sentenced to death but escaped and the sentence was never executed; was indicted, tried, convicted and sentenced to death by a criminal court of Knox County, Tennessee, for the same murder after the war was over, the Supreme Court of the United States stated the same principle as above, as follows: "Though the late war was not between independent nations, but between portions of the same nation, yet having taken the proportions of a territorial war, the insurgents having become formidable enough to

be recognized as belligerents, the same doctrine (that of exempting members of the invading army from trial by the local courts) must be held to apply. The right to govern the territory of the enemy during its military occupation is one of the incidents of war, being a consequence of its acquisition; and the character and form of the government to be established depend entirely upon the laws of the conquering state or the orders of its military commander. By such occupation the political relations between the people of the hostile country and their former government or sovereign are for the time severed; but the municipal laws—that is, the laws which regulate private rights, enforce contracts, punish crime, and regulate the transfer of property—remain in full force, so far as they affect the inhabitants of the country among themselves, unless suspended or superseded by the conqueror.”

Agents for Carrying Military Government Into Execution

Handlin vs. Wickliffe

Supreme Court of the United States, 1870, 12 Wallace 173.

Statement of the Case

During the War of the Rebellion, while Louisiana was occupied by United States troops, one Handlin was commissioned Judge of the Third District Court of New Orleans by Brigadier General Shepley, the military governor.

Subsequently, while the war was still flagrant, a constitution was adopted for the state under military orders.

Michael Hahn was elected governor and also the President appointed him military governor to succeed Shepley.

Governor Hahn removed Handlin from his judgeship. Handlin asserted that, notwithstanding his removal, he of right remained in office and was entitled to the salary thereof. After the reconstruction of the State, Handlin sued out a writ of mandamus in an inferior court of Louisiana against Wickliffe, the state auditor, to compel payment.

The judgment was against Handlin, and he appealed to the Supreme Court of Louisiana which affirmed the judgment of the lower court. Handlin then took the case on a writ of error to the Supreme Court of the United States which affirmed the judgment of the Supreme Court of Louisiana.

The Chief Justice, in delivering the opinion, said:

* * * * *

It is too clear for argument that the appointment

of the relator as judge was purely military, authorized only by the necessities of military occupation, and was subject to revocation whenever, in the judgment of the military governor, revocation should become necessary or expedient. The adoption of the constitution during the war, under military orders, and the election of Hahn as governor did not affect the military occupation, in the judgment of the national authorities, for Hahn was appointed military governor by the President. If the situation was not changed, Hahn, as military governor, had the same right as his predecessor to revoke the appointment of judge. If it was changed and the civil constitution of the State was in full operation, independent of military control, the authority derived from the appointment by the military governor designated by the President ceased of necessity. The office became vacant, and Hahn had whatever authority the State constitution conferred to enforce the vacancy by removal, and to fill it by a new appointment. * * * The judgment of the Supreme Court of Louisiana is therefore affirmed.

All Inhabitants Enemies

Mrs. Alexander's Cotton
Supreme Court of the United States, 1864, 2 Wallace 404

Statement of the Case

Mrs. Elizabeth Alexander owned, lived on and raised cotton on a farm in the Parish of Avoyelles, on the Red River in Louisiana. She went there in 1835 and lived there continuously and was living there in 1864. In the spring of 1864 the Confederates were in possession and complete occupation of a large district on the Red River which included Mrs. Alexander's farm. Fort De Russy was near her farm.

In this spring, 1864, a joint expedition of U. S. forces, gunboats under Rear Admiral Porter and troops under Major General Banks, proceeded up the Red River to and beyond Mrs. Alexander's farm. About the 15th of March these forces captured Fort De Russy.

The Confederates were forced back until most of the district, including Mrs. Alexander's farm, was under the control of the Union arms. The actual control of the Union forces lasted from the middle of March to the end of April, when the Confederates retook the territory.

On or about the 26th of March, a party from one of the gunboats, acting under the orders of the naval commander, landed on the farm of Mrs. Alexander and took possession of seventy-two bales of cotton which had been raised by Mrs. Alexander on her farm and which was stored in a building on the farm about one mile from the river. This cotton was shipped to Cairo, Illinois, being labelled there as prize

of war in the U. S. District Court, S. D. of Illinois, and sold *pendente lite*. Mrs. Alexander put in a claim for the proceeds under act of March 12, 1863 (hereafter quoted), and the Court made a decree giving them to her. This decree being confirmed in the Circuit Court, the United States appealed to the Supreme Court of the United States.

THE POINTS OF LAW TO BE DECIDED

1. Was the property enemy's property?
2. Was it properly and legally subject to capture?
3. Could it properly and legally be considered as "maritime prize"?

The vessels used on this expedition were of light draft, some of them steamboats fitted out with guns, not previously used nor suitable for use at sea. They were prepared for use in connection with the army in operations along small streams away from the coast. The Red River empties into the Mississippi some 300 or more miles from the coast and Mrs. Alexander's farm was on the Red River thirty or forty miles from its mouth. Seagoing vessels could not navigate this river; only vessels of light draft could.

Mrs. Alexander's personal loyalty was not conclusively proven; teams and hands of her farm had assisted the Confederates somewhat in building Fort De Russy, but by the testimony, under compulsion. She treated Union and Rebel sick alike. She had particular friends known to be loyal Unionists. Confederate officers came to her house, but the testimony showed that it was perhaps not politics nor cotton that drew them there, but that they went to visit ladies living there—some young ladies lived with her.

Three weeks after the cotton had been seized, Mrs. Alexander took the oath required by the Presi-

dent's proclamation of amnesty of December 8, 1863, which gave her

"full pardon," "with restoration of all rights except as to slaves and 'property,' and cases where rights of third persons intervened."

Mrs. Alexander was about 65 years old and had never left her place. The oath taken by Mrs. Alexander included that she would

"henceforth faithfully support, protect and defend the Constitution of the United States, and the Union of the States themselves."

By Act of August 6th, 1861,

"Congress declared that if any person should use or employ any property in aiding, abetting or promoting the insurrection, or consent to such use or employment, such property should 'be lawful subject of prize and capture wherever found.'"

And by Act of July 17th, 1862, it declared

"'All the estate and property' of persons in rebellion, and who, after sixty days public warning, did not return to their allegiance, *liable to seizure*"

and made it the duty of the President to "seize" it; prescribing the mode in which it should be condemned.

And by Act of March 12, 1863,

"To provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts, etc., made it the duty, under the penalty of dismissal, etc., of 'every officer or private of the regular or volunteer forces of the United States, or *any officer, sailor or marine in the naval service* of the United States, who may take or receive any such abandoned property, or cotton, etc., * * * to *turn the same over to an agent*' to be appointed, etc."

The act provided that

“None of the provisions of this act should apply to any lawful maritime prize by the naval force of the U. S.”

And also that

“Any person claiming to have been the owner of such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the court of claims, and on proof to the satisfaction of the said court of his ownership, etc., and that he had never given any aid or comfort to the present rebellion, receive the residue of such proceeds after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale.”

And by Act of July 17, 1862,

“That the proceeds of all ships and vessels and the goods taken on them, which shall be adjudged good prizes, shall, when of equal or superior force, to the vessel making the capture, be the sole property of the captors, and when of inferior force shall be divided equally between the U. S. and the officers and men making the capture”.

OPINION OF THE COURT

Chief Justice Chase delivering the opinion said:

(1) “There can be no doubt, we think, that it was enemy’s property. The military occupation by the National military forces was too limited. * * * Fort De Russy was constructed in part by labor from the farm, * * * It is said that Mrs. Alexander, though remaining in rebel territory, has no personal sympathy with the rebel cause, etc. * * ; but this court cannot inquire into the personal character and disposition of individual inhabitants of enemy territory. * * * Being enemy’s property, the cotton was liable (2) to capture and confiscation

* * *. It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists and from judicial decisions. It may now be regarded as substantially restricted to special cases dictated by the necessity of operations of the war; and as excluding in general, the seizure of private property of pacific persons for the sake of gain. The commanding general may determine in what special cases its more stringent application is required by military emergencies; while considerations of public policy and positive provisions of law, and the general spirit of legislation, must indicate the cases in which its application may be properly denied to the property of non-combatant enemies.

(3) "In the case before us, the capture seems to have been justified by the peculiar character of the property and by legislation. * * * The rebels regard it as one of their main sinews of war; and no principle of equity or just policy required * * that it should be spared from capture * * *.

"And the capture was justified by legislation * * * Act of Congress, August 6th, 1861, * * and July 17th, 1862 * * and March 12th, 1863. * *

"Mrs. Alexander being now a resident in enemy territory, and in law an enemy, can have no standing in any court of the United States so long as that relation shall exist."

"But this reasoning * * * by no means warrants the conclusion that the property captured was maritime prize. * * * In no case cited does it appear that private property on land was held as 'Maritime prize'. * * This act (July 16, 1862) excludes property on land from the category of prize for the benefit of captors; and seems to be decisive of the case so far as the claims of captors are concerned. * *

"By an act (20 July 1864) of the next session,

Congress abolished maritime prizes on inland waters.

" * * * We think it clear that the cotton in controversy was not maritime prize, but should have been turned over to the agent of the Treasury Department, to be disposed of under the act of March 12th, 1863. Not having been so turned over, but having been sold by order of the District Court, its proceeds should now be paid into the Treasury of the United States., in order that the claimant, when the rebellion is suppressed or she has been able to leave the rebel region, may have the opportunity to bring suit in the Court of Claims, and, on making the proof required by the act, have the proper decree.

"The decree of the District Court is reversed, and the case remanded with directions to

"Dismiss the Libel."

Cases and Authorities Cited

2 Black 687.

1 Kent, 92, Id, 93.

Act Congress, August 6, 1861. (12 Stat. at large, 319)

Act Congress, July 17, 1862. (12 Stat. at large, 591-606)

Act Congress, March 12, 1863. (12 Stat. at large, 820)

Report Secretary of War, on Finances, December 10, 1863, p. 438.

Edwards, 107 (Eng.).

NOTES

1. In *Thirty Hogsheads of Sugar vs. Boyle*, 9 Cranch 191 (1815), the facts were as follows: The Island of Santa Cruz, belonging to the Kingdom of Denmark, was subdued during the late war by the arms of His Britannic Majesty. Adrian Benjamin Bentzon, an officer of the Danish government, and a proprietor of land therein, withdrew from the island

on its surrender, and afterwards resided in Denmark, with which country the United States was at peace. The property of the Island having been secured to the inhabitants, Bentzon still retained his estate therein under the management of an agent, who, during the war shipped 30 hogsheads of sugar, the produce of the estate, on board a British ship to a commercial house in London. During the voyage the ship was captured by an American privateer and brought into Baltimore where both vessel and cargo were libelled for forfeiture as prize of war. A claim for the sugar was put in by Bentzon but it was condemned with the rest of the cargo. The Supreme Court of the United States held that the produce of a colony in the possession of an enemy is to be considered as hostile property, so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or whatever may be his place of residence; that although acquisitions of territory made during a war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror so long as he retains the possession and government of them.

2. In *The Venus*, 8 Cranch 253 (1814), the case arose by reason of the capture of the vessel by an American privateer on August 6, 1812, during the War of 1812. The ship had sailed from Liverpool on July 4, 1812, under a British license, for the port of New York. The owners of the cargo did not know at the time of the sailing of the declaration of war. They were natives of Great Britain who had been naturalized in the United States and then later returned to England, settled there and engaged in trade. The ship and cargo were nevertheless condemned. The Supreme Court of the United States held in this connection that the property of domiciled subjects, equally with that of native subjects in their totality, is to be considered as the goods of the nation, in regard to other States; that in time of war such property is subject to reprisals and also to capture by the enemy on the high seas; that the status of domicile adheres until the domiciled person puts himself in motion, *bona fide*, to quit the country with-

out the intention of returning; that the property of an American citizen, equally with that of a neutral, domiciled in hostile country at the outbreak of the war is subject to capture on the high seas by the United States until such person puts himself in motion, *bona fide*, to quit the country in which domiciled.

3. In *Mitchell vs. United States*, 21 Wallace 350 (1874), the facts were that Mitchell who lived in Kentucky, a loyal State, went into the insurgent states after the outbreak of the Civil War in 1861 on a pass issued by a military commander. He remained there until 1864 when, after the capture of Savannah by General Sherman, he returned to Kentucky. While remaining in the Confederate States he purchased a large number of bales of cotton which was captured by the Federals at the occupation of Savannah. Mitchell sued for the value thereof in the Court of Claims. The title of the claimant to the cotton depended upon whether, at the time of the purchase, he was domiciled within a loyal State or within the Confederacy. The Supreme Court of the United States held that domicile was defined as a residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time; that a domicile, once established, is presumed to continue until shown to have been changed; furthermore that during the continuance of the rebellion it was illegal for an inhabitant of a loyal State to take up his abode within the insurgent States. The claim was therefore dismissed.

4. In *The Prize Cases*, 2 Black 635, (1862), a condemnation proceeding in the cases of several vessels which had been captured by the Union blockading fleet in the earlier part of the Civil War for breaking blockade. the Supreme Court of the United States held that all persons residing within the hostile territory, whose property may be used to increase the revenues of the hostile power, are liable to be treated as enemies though not foreigners; that whether property be liable to capture as enemies' property does not depend on the personal allegiance of the owner, or whether he be an ally or a citizen.

5. In *Gates vs. Goodloe*, 101 U. S. 612 (1879),

which arose through a suit for the rent of a storehouse in Memphis, Tenn., the following are the facts: The storehouse was leased to the plaintiff in error in 1859 for 5 years. Union troops took possession of Memphis in June, 1862. The owner left Memphis on the approach of the Union troops and remained within the Confederate lines until 1864. In August, 1862, the General commanding at Memphis issued an order directing the lessees of all buildings whose owners had "gone South" to pay their rents to the Quartermaster. The plaintiff in error refused to do this and was evicted. Until July, 1863, the property remained in control of the United States military authorities. The Supreme Court of the United States say, with reference to the owner, that when he abandoned his home and entered the military lines of the enemy, he was beyond question in full sympathy and active cooperation with those who sought by armed force to overthrow the Union. Neither in his answer nor in his deposition does he intimate that he has any sympathy with the United States in its efforts to suppress insurrection. He was therefore in the very fullest legal sense an enemy of the government during his stay within the military lines of the rebellion, liable to be treated as such both as to his person and property. His remaining there was in plain violation of law and disregard of duty. In the *William Bagaley*, 5 Wallace 377, we said that it was the duty of a citizen, when war breaks out, if it be a foreign war, and he is abroad, to return without delay; and if it be a civil war, and he is a resident of a rebellious section, he should leave it as soon as practicable and adhere to the regular established government.

6. In *Miller vs. United States*, 11 Wallace 268 (1870), which was a proceeding under the confiscation Acts of August 6th, 1861, and July 17th, 1862, to confiscate certain shares of stock in two corporations created by the State of Michigan belonging to Samuel Miller, a rebel citizen whose property was confiscable under the terms of those acts, the Supreme Court of the United States said that it must be that when a rebellion has become a recognized war, those who are engaged in it are to be regarded as enemies, and that although the laws of nations have not de-

finer who, in case of a civil war, are to be regarded as, and may be treated as, enemies, yet, clearly, those must be considered such who, though subjects or citizens of the lawful government, are residents of the territory under the power or control of the party resisting that government.

Laws Obligatory Within Occupied Territory

The Bark Grapeshot
Supreme Court of the United States, 1869, 2 Wallace 129

Statement of the Case

Appeal from the Circuit Court of the United States for the District of Louisiana.

July 3, 1858, Wallenstein, Masset & Co. libeled the Grapeshot in the District Court of the United States to compel payment upon a bottomry bond executed by her master, in favor of that firm, at Rio Janerio, early in the same year. The Grapeshot was sold, and a decree entered in 1860 in favor of the libelants. The claimant thereupon appealed to the Circuit Court. Before judgment was rendered therein the Civil War broke out, and it became impossible for the United States Courts to continue their functions. Federal troops took possession of New Orleans in 1862. In October of that year, President Lincoln, by proclamation, established a Provisional Court for the State of Louisiana, whose jurisdiction included the power to determine cases in admiralty. The case in question, by consent of parties, was then transferred to this Provisional Court, by which a judgment was rendered, again in favor of the libelants.

July 28, 1866, Congress enacted that:

* * * all suits, causes, and proceedings in the Provisional Court, proper for the jurisdiction of the Circuit Court of the United States for the Eastern District of Louisiana, should be transferred to that court, and heard and determined therein; and that all judgments, orders and decrees of the Provisional

Court in causes transferred to the Circuit Court should at once become the orders, judgments and decrees of that court; and might be enforced, pleaded and proved accordingly.—15 Stat. at Large, 366.”

Under this statute the decree of the Provisional Court became that of the Circuit Court. The claimant then, in 1866, appealed to the Supreme Court of the United States.

THE POINT OF LAW TO BE DECIDED

That court had first to decide the question: Was the establishment by the President of a Provisional Court warranted by the Constitution?

The decision was in the affirmative.

OPINION OF THE COURT

Mr. Chief Justice Chase delivered the opinion which upon this point was as follows:

“That the late rebellion, when it assumed the character of civil war, was attended by the general incidents of a regular war, has been so frequently declared here that nothing further need be said on that point.

“The object of the National Government, indeed, was neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority. But in the attainment of these ends, through military force, it became the duty of the National Government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the national forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.

“The duty of the National Government in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the Presi-

dent as Commander in Chief, and intrusted as such with the direction of the military force by which the occupation was held.

“What that duty is, when the territory occupied by the national forces is foreign territory, has been declared by this court in several cases arising from such occupation during the late war with Mexico. In the case of *Leitensdorfer vs. Webb* (20 How. 176) the authority of the officer holding possession for the United States to establish a provisional government was sustained; and the reasons by which that judgment was supported, apply directly to the establishment of the Provisional Court in Louisiana.

* * * *

“We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during the war; or that Congress had power, upon the close of the war, and the dissolution of the Provisional Court, to provide for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States.”

The remainder of the long opinion deals entirely with the rules of law governing in matters of liens upon bottomry bonds, and is of no interest to the student of the law of military government.

Cases Cited

The Venice, 2 Wallace 259.
Leitensdorfer vs. Webb, 20 Howard 176.
Jecker vs. Montgomery, 13 Howard 498.
Cross vs. Harrison, 16 Howard 164.
U. S. vs. Rice, 4 Wheaton 246.
Texas vs. White, 7 Wallace 700.

NOTES

1. In the case of *Jecker vs. Montgomery*, 13 Howard 498 (1851), the facts were as follows: During the war with Mexico, the Admittance, an Ameri-

can vessel, was seized in a port of California, by the commander of a vessel of war of the United States, upon suspicion of trading with the enemy. She was condemned as lawful prize by the chaplain of one of the American war vessels upon that station, who had been authorized by the President of the United States to exercise admiralty jurisdiction in cases of capture. The owners of the cargo filed a libel against the captain of the capturing vessel of war, in the admiralty court for the District of Columbia. The Supreme Court of the United States, with respect to the validity of the chaplain's proceedings in the case, say:

"All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the general government is vested in one supreme court and in such inferior courts as Congress may from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States. And neither the President nor any military officer under him can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.

"The courts established or sanctioned in Mexico during the war by the commanders of the American forces were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of the court at Monterey (the chaplain's court) is a nullity,

and can have no effect upon the rights of any party."

2. In U. S. vs. Reiter and U. S. vs. Louis, Federal Case 16,146 (1865), where Reiter was tried for the murder of his wife and Louis for arson before the Provisional Court established by the President for the State of Louisiana during the Civil War, and Reiter claimed that the Court, in its constitution and creation, had not originally the warrant of law to try him, while Louis, admitting that the Court originally had jurisdiction to try him, objected to its present jurisdiction on the ground that certain steps had been taken in Louisiana toward the re-establishment of a state civil government, the Court sustained its own jurisdiction in the two cases saying that from the time of its establishment to the time of the trials just mentioned it had rightfully exercised its functions in territory in which the government of the United States had been by force of its arms sovereign and would rightfully continue to exercise them there so long as its commission should remain unrevoked and the power of the United States should continue to support it in the exercise of them.

Mechanics' and Traders' Bank vs. Union Bank

Supreme Court of the United States, 1874, 22 Wallace 276

Statement of the Case

During the War of the Rebellion, Louisiana was one of the Confederate States. General Butler, commissioned by the United States to carry on the war in a department containing Louisiana, took possession about April 29, 1862, of the city of New Orleans.

The only money then circulating in New Orleans was Confederate notes. On May 1st General Butler issued an order allowing the circulation of these notes "until further orders". On the next day he established a court by the following order:

"Major J. M. Bell, Volunteer Aide-de-camp, of the division staff, is hereby appointed provost judge of the city of New Orleans, and will be obeyed and respected accordingly."

At different dates between the 5th and 13th days of May, 1862, the Union Bank of New Orleans loaned to the Mechanics' and Traders' Bank of that place, \$130,000.00 in Confederate notes. Whether there was any agreement beyond the tacit one that the amount should be repaid in money as current as the notes when borrowed, is not clear. On May 16th, General Butler ordered that on May 27th following, all circulation of or trading in Confederate notes should cease in his department. On May 26th, the M. & T. Bank tendered to the Union Bank in payment of its debt, the \$130,000.00 in Confederate notes with interest. The Union Bank refused to receive these depreciated notes as payment, and soon

after sued in the Provost Court to obtain the money loaned.

The Provost Court at first dismissed the suit, but soon afterward the case was reopened, and said Court decided in favor of the plaintiff. The borrowing bank then under protest paid the \$130,000.00 with interest, in lawful money of the United States.

Some years later, after the cessation of the war, suit was brought by the M. and T. Bank for the recovery of this money thus paid, said suit being brought in an inferior court of Louisiana. The case was decided against the plaintiff and was later taken by him to the State Supreme Court, where the decision of the lower court being affirmed, he carried the case to the U. S. Supreme Court.

THE POINTS OF LAW TO BE DECIDED

1. During the Civil War, did the military authorities have the right, under the Constitution of the United States, to appoint courts for the trial of civil cases in conquered insurgent territory?

2. There being no proof to the contrary, should the proclamation of the commanding general establishing such courts in said territory, be considered as authorized by the President?

3. Though one of said courts so established be called a "Provost Court," was it within the power of the military authorities creating it to have given it much greater jurisdiction than that over minor criminal offenses?

4. Is the question as to whether the Provost Court in the case herein, acted within its jurisdiction in ordering the payment by the Mechanics' and Traders' Bank of the money, one for the action of the State courts, or is it one for the action of the U. S. Supreme Court?

OPINION OF THE COURT

1. It was decided that the military authorities had the right to appoint courts for the trial of civil cases in insurgent territory. This subject was previously considered in the "Grapeshot" (9 Wallace 129). With reference to this case, the Supreme Court, in its decision on the first question, say:

"It was decided that when, during the late Civil War, portions of the insurgent territory were occupied by the national forces, it was within the constitutional authority of the President, as commander-in-chief, to establish therein provisional courts for the hearing and determination of all cases arising under the laws of the State or of the United States. * * * Its establishment by military authority was held to be no violation of the constitutional provision that 'The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.'"

The Supreme Court further states to the following effect: That the said clause of the Constitution has no reference to territory occupied by a conquering army of the United States, and refers only to courts of the United States, not to military courts.

The Supreme Court in the "Grapeshot" stated:

"It became the duty of the national government, wherever the insurgent power was overthrown, and the territory which was dominated by it was occupied by the national forces, to provide, as far as possible, so long as the war continued, for the security of persons and property and for the administration of justice. The duty of the national government in this respect was no other than that which devolves upon a regular belligerent, occupying during war the territory of another belligerent. It was a duty to be performed by the President, as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held."

2. With reference to the second point of law, the court decided that the proclamation of the commanding general creating said court should be considered as authorized by the President. In its decision the Court refers to the case of *Leitensdorfer and Houghton vs. Webb*, in which the Supreme Court of the United States had sustained the action of General Kearney, commanding the occupying army in New Mexico, in creating without express orders from the President, courts for administering justice in the conquered territory. The Court, in its decision on question two (2), further states:

“They argue however, that * * * General Butler had no authority to establish such a court: that the President alone, as commander in chief, had such authority. We do not concur in this view. General Butler was in command of the conquering and occupying army. He was commissioned to carry on the war in Louisiana. He was therefore invested with all the powers of making war, except so far as they were denied to him by the Commander-in-Chief, and among these powers, as we have seen, was that of establishing courts in conquered territory. It must be presumed that he acted under the orders of his superior officer, the President, and that his acts, in the prosecution of war, were the acts of his commander in chief.”

3. With reference to the question (3) the plaintiff argued that the “Provost Court” created by General Butler was what its name implies and as such could take cognizance of minor criminal offenses only. The Supreme Court in its decision states that a Provost Court ordinarily has cognizance of minor criminal offenses only. It further says,—

“But that a larger jurisdiction may be given to it, by the power which brings it into being, is undeniable.”

4. The question as to whether the Provost

Court transcended its jurisdiction in ordering the money paid to the Union Bank is, the court declares, a question for the State Courts to decide. The court says:—

“The Supreme Court of Louisiana decided that General Butler had a right after the capture of New Orleans in May, 1862, to appoint a judge to try civil cases, notwithstanding the provisions of the Constitution. Having determined that he has such a right, we have disposed of the question which entitles the case to be heard here, and it is not a question for us to enquire whether the Provost Court acted within its jurisdiction or not. That is a question exclusively for the State tribunals.”

Cases Cited by the Court

The Grapeshot, 9 Wallace 129.

Leitensdorfer and Houghton vs. Webb,
20 Howard, 176.

Dean vs. Nelson

In the United States Supreme Court, 1869, 10 Wallace 158
Appealed from the United States Circuit Court for
West Tennessee

Statement of the Case

Early in the year of 1861 Thompson Dean, of Cincinnati, was the owner of certain shares of stock in the Memphis Gas Light Company. Fearing the uncertainties of approaching hostilities, Dean, in May of that year, transferred these shares to one Peffer, the secretary of the company, with instructions to dispose of them on his (Dean's) account. Peffer accordingly on June 11th, 1861, sold at par and transferred to one Nelson, fifty of these shares, taking in payment his note under seal for five thousand dollars, with interest, payable in such quarterly installments as might be earned by the shares as dividends. In order to secure these payments Nelson executed a paper in the form of a mortgage, purporting to pledge so much of the real and personal property of the Memphis Gas Light Company as was represented by the fifty shares in question. This instrument concluded with the usual clause of defeasance and was duly recorded. Nine days later Peffer sold Nelson one hundred and fifty-four additional shares, receiving a similar note and mortgage. These notes and mortgages were promptly assigned by Peffer to Dean.

Dean withdrew to Cincinnati where he remained while the Confederates were in control of this territory. Nelson continued to reside in Memphis and

sometime later, June 1st, 1862, transferred ten shares to one May with the intention of naming him a director of the company. The remaining one hundred and ninety-four shares were transferred by Nelson to his wife. Both of these transfers were without pecuniary consideration.

On the 6th of June, 1862, the Federal forces occupied Memphis and held that city until the close of the war. Shortly afterward Dean visited Memphis and endeavored to arrive at some settlement with Nelson, but the latter alleged that Dean refused to accept payment on account of the note but demanded the return of the stock, claiming that it had been forfeited because of failure to make payment in accordance with the terms of the mortgage. As this stock had earned 18% dividends in the one year that had elapsed since the sale, there seemed to be something to this claim.

On the 5th of April, 1863, Nelson, who was a Southern sympathizer, was ordered to remove with his family south of the lines occupied by the Union forces and not return. This order he obeyed. May had remained without the Union lines.

On April 5th, 1863, the Federal commander of the military district of Memphis organized a court or civil commission for the trial of civil suits. Before this court Dean, on September 1st, 1863, filed a petition alleging the sale of the stock to Nelson, the non-payment of the note, and the execution of the mortgage given to secure such payments. The prayer asked for the sale of the stock and the foreclosure of the equity of redemption. Nelson and his wife, also May, were made defendants. They were returned "not found" whereupon recourse was had to notice by publication in accordance with the Tennessee law existing at the outbreak of the war. No appearance having been effected, a decree was issued in Dean's

favor. Execution issued and the stock was sold by the marshal to one Hamlin who immediately transferred it to Dean to whom dividends were thereafter paid. After the close of the war Nelson, his wife and May filed a bill in equity praying a decree that the stock belonged to them and asking an accounting of the dividends received by Dean to be applied in payment of the note. Dean in his answer claimed that Nelson's failure to pay the note in accordance with the agreement had worked an absolute forfeiture of the stock; that the instrument given to secure the payments was not considered as a mortgage with its consequent equity of redemption. He further claimed that even were this instrument adjudged to be a mortgage its equity of redemption had been foreclosed by the decree of the civil court of commission, heretofore mentioned. Nelson replied insisting that the instrument was a mere mortgage; that the condition forfeiting the shares upon non-payment was a penalty which could not be enforced in equity; that the court or civil commission was an illegal body without authority to decree the sale of the stock; that the conditions of war required him to remain away from Memphis and prevented any action against him or his property while such conditions lasted.

The court below found in favor of the claimants whereupon Dean appealed the case to the United States Supreme Court where he set up the additional ground that the assignment of the stock to Nelson was made without consideration and was therefore void, also that the action of the civil commission or court was a bar to further proceedings.

THE POINTS OF LAW TO BE DECIDED

1. Was the sale of the shares to Nelson a *bona fide* sale?

2. Was the paper executed by Nelson a mortgage?
3. Was the civil commission or court a legal tribunal?
4. Were its proceedings decreeing the sale of the shares valid?

OPINION OF THE COURT

The opinion was delivered by Mr. Justice Bradley.

Concerning the first of the above questions the court said:

* * * "Here the sale was actually made and the stock transferred to Nelson, so that, in the absence of fraud, the stock became absolutely his. And it is hardly necessary to say that Nelson incurred no obligation in the transaction. He agreed to pay the whole amount immediately in case of failure to pay any installment after the receipt by the company of the next quarterly earnings. And this condition was not in the nature of a penalty. * * * so that, on failure to pay or tender the money received by him, or by the company, on account of the stock purchased, the whole debt became due and payable as a personal obligation to Nelson."

Concerning the 2d question (was the paper a mortgage) the court said:

* * * "and if it is a mortgage it has, perforce, all the incidents and privileges of a mortgage; and that it is a mortgage there is no room for question. * * * The appellee himself, calls it a mortgage and the doctrine of 'once a mortgage always a mortgage' applies to it."

Concerning the 4th question (as to the legality of the proceedings of the civil commission) the court said:

* * * "the proceedings themselves, were fatally defective. The defendants in the proceedings were within the Confederate lines at the time and it was unlawful to cross those lines. * * * A notice directed

to them was mere idle form. They could not lawfully see or obey it. As to them the proceedings were wholly void and inoperative.

This leaves the equity of redemption unextinguished; and it is, therefore, the right of the appellees to redeem it."

The decree of the circuit court was so modified as to award the stock to Nelson, his wife and May upon payment of such sum as on an accounting, which was ordered, was found to be due.

For the reason of the decision in the matter of the fourth question the court did not pass upon the legality of the civil commission appointed by the military commander of the district of Memphis.

Coleman vs. Tennessee

Supreme Court of the United States, 1878, 97 U. S. 509

Statement of the Case

During the year 1865, and towards the close of the Civil War, the State of Tennessee was in the military occupation of the United States, with a military governor appointed by the President at its head.

On March 7, 1865, Pryor Coleman, a corporal, Company G, 1st Tennessee Volunteer Cavalry, a soldier in the military service of the United States, and a member of the occupying army, murdered Mourning Ann Bell in Knox County, Tennessee, by shooting her through the head with a pistol.

On March 24, 1865, Coleman was brought to trial for this offense before a general court-martial, convened under the authority of the United States, at Knoxville, Tennessee; he was found guilty and sentenced to death by hanging. The sentence was approved and ordered to be carried into execution at Knoxville, Tennessee, on July 21, 1865, but never was executed, due to the fact that the accused escaped from military custody.

On April 2, 1866, peace was declared, and on October 2, 1874, after the civil government of the State of Tennessee had again resumed control, Coleman was indicted for the murder of Mourning Ann Bell by a grand jury in Knox County. He was brought before the Criminal Court for the District of Knox County. He plead not guilty, and offered in evidence the fact that he had been tried and convicted for this very offense by a general court-martial and sentenced to death by hanging, and that this

sentence was still standing as the judgment of the court martial without any further action taken thereon. In view of the double jeopardy involved he prayed that the indictment be quashed.

The State demurred to this plea on the ground, among others, that the conviction by a general court-martial of a violation of the laws of the United States was no bar to an indictment for the same offense, because the offense in this case was also a violation of the laws of Tennessee. The demurrer was sustained; Coleman was thereupon tried by the Criminal Court of the District of Knox County, convicted and sentenced to death.

The case was appealed to the Supreme Court of the State of Tennessee and the judgment of the Criminal Court was there affirmed.

Pending the appeal, Coleman swore out a writ of habeas corpus before the Circuit Court of the United States for the Eastern District of Tennessee, stating that he was unlawfully restrained of his liberty by the sheriff of Knox County, being held upon a charge of murder for which he had already been convicted by a court-martial. The Circuit Court of the United States ordered the discharge of the prisoner from custody.

This order was presented by the counsel for Coleman to the Supreme Court of Tennessee with the request that the prisoner be discharged. The Supreme Court of Tennessee, however, heard the case and decided that the Circuit Court of the United States had no authority to issue writs of habeas corpus in cases of offenses committed against the laws of the State, and consequently the order of the Circuit Court of the United States was a nullity.

It also decided that a plea of a prior conviction by a general court-martial constituted no bar to trial in a state court, on the ground that the crime of

murder, committed by the defendant while he was a soldier, was not less an offense against the laws of the State because it was punishable by a general court-martial.

On the affirmation by the Supreme Court of Tennessee of the judgment of the Criminal Court of Knox County, Coleman appealed his case to the Supreme Court of the United States.

THE POINTS OF LAW TO BE DECIDED

1st.—Inasmuch as it was argued before the Supreme Court of the United States that the Thirtieth Section of the Act of Congress of March 3, 1863 (which is almost the same as the present 58th Article of War), vested in general courts-martial the exclusive right, in time of war, to try members of the military establishment for the crimes set forth therein, it was necessary for the Court to determine whether or not military tribunals were vested with this right, in time of war, to the exclusion of the right of a state to try military persons for such crimes.

2d. Coleman was brought to trial before a court of the State of Tennessee for a violation of the laws of that State, committed at a time when that state was under military government. It was therefore necessary that it be decided to what extent, if any, the laws of the State of Tennessee controlled or exercised jurisdiction over the members of the military establishment of the occupying power; for if they exercised no jurisdiction at the time of the occupation and could not initiate trials for offenses committed against them then, they could hardly do so later on.

3d. If, at the time of the commission of the offense, and when the State of Tennessee was under

military government, any of the laws of that state were in force to whom did they apply?

OPINION OF THE COURT

As to the first question the thirtieth section of the Act of Congress of March 3, 1863, reads as follows:—

“That in time of war, insurrection or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with intent to commit rape, and larceny, shall be punishable by a sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the Articles of War; and the punishment for such offenses shall never be less than those inflicted by the laws of the State, territory or district in which they may have been committed.” (12 Stat. 736)

The opinion of the court is given in the following language:—

“It (the above section) was enacted not merely to insure order and discipline among the men composing those forces, but to protect citizens not in the military service from the violence of soldiers. * * * But the section does not make the jurisdiction of the military tribunals exclusive of that of the State courts. It does not declare that soldiers committing the offenses named shall not be amenable to punishment by State courts.

“It simply declares that the offenses shall be ‘punishable’, not that they shall be punished by the military courts; and this is merely saying that they may be thus punished.

“Previously to its enactment, the offenses designated were punishable by the State courts, and persons in the military service who committed them were delivered over to these courts for trial; and it contains no words indicating an intention on the part of Congress to take from them the jurisdiction which

in this respect they had always exercised. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect. * * *

"All we now affirm is, that by the law to which we are referred, the thirtieth section of the Enrollment Act, no such exclusive jurisdiction is vested in the military tribunals mentioned. * * * * *

"In denying to the military tribunals exclusive jurisdiction, under the section in question, over the offenses mentioned, when committed by persons in the military service of the United States and subject to the Articles of War, we have reference to them when they were held in States occupying, as members of the Union, their normal and constitutional relations to the Federal government, in which the supremacy of that government was recognized, and the civil courts were open and in the undisturbed exercise of their jurisdiction. When the armies of the United States were in the territory of the insurgent States, banded together in hostility to the national government and making war against it, in other words when the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service, officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offenses committed by them. They were answerable to their own government, and only by its laws as enforced by its armies, could they be punished."

In regard to the second question the court said:

"It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. * * * If an army marching through a friendly country would thus be exempt

from its civil and criminal jurisdiction, *a fortiori* would an army invading an enemy's country be exempt. The fact that war is waged between two countries negatives the possibility of jurisdiction being exercised by the tribunals of the one country over persons engaged in the military service of the other for offenses committed in such service. Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded.

"The fact that when the offense was committed, for which the defendant was indicted, the State of Tennessee was in the military occupation of the United States with a military governor at its head, appointed by the President, cannot alter this conclusion. Tennessee was one of the insurgent states, forming the organization known as the Confederate States, against which the war was waged. Her territory was enemy's country, and its character in this respect was not changed until long afterwards."

In respect to the third question the decision of the court was rendered as follows:

"Though the late war was not between independent nations, but between different portions of the same nation, yet having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerents, the same doctrine must be held to apply. The right to govern the territory of the enemy during its military occupation is one of the incidents of war, being a consequence of its acquisition; and the character and form of the government to be established depend entirely upon the laws of the conquering state or the orders of its military commander. By such occupation the political relations between the people of the hostile country and their former government or sovereign are for the time severed; but the municipal laws—that is, the laws which regulate private rights, enforce contracts, punish crime, and regulate the transfer of property—remain in full force, so far as they affect the inhabitants of the country among

themselves, unless suspended or superseded by the conqueror.

"The laws of the state for the punishment of crime were continued in force only for the protection and benefit of its own people. As respects them, the same acts which constituted offenses before the military occupation constituted offenses afterwards; and the same tribunals, unless superseded by order of the military commanders, continued to exercise their ordinary jurisdiction."

It might be added that with reference to the plea of Coleman to double jeopardy the Supreme Court held that this was not a proper plea in this case as such a plea admitted the jurisdiction of the Criminal Court of Knox Co., Tenn., to try the case were it not for the prior trial by the general court-martial, whereas it is seen from the foregoing that such was not the case.

The judgment of the Supreme Court of Tennessee was reversed, and the cause remanded with directions to discharge the defendant from custody by the Sheriff of Knox County on the indictment and conviction for murder in the State court. The Supreme Court went on to say, "But as the defendant was guilty of murder, as clearly appears not only by the evidence in the record in this case but in the record of the proceedings of the court-martial—a murder committed, too, under circumstances of great atrocity—and as he was convicted of the crime by that court and sentenced to death, and it appears by his plea that the said judgment was duly approved and still remains without any action having been taken upon it, he may be delivered up to the military authorities of the United States to be dealt with as required by law."

It may be interesting to note that Coleman was turned over to the military authorities, and that President Hayes on June 6th, 1879, commuted his death sentence to imprisonment for life and desig-

nated the State Penitentiary at Albany, New York,
to be the place of confinement.

Cases Cited

U. S. Supreme Court.

The Exchange, 7 Cranch 139.

Dow vs. Johnson

Supreme Court of the United States, 1879, 100 U. S. 158

Statement of the Case

Neal Dow, a brigadier general in the United States army during the civil war, was in 1862 and 1863 in command of Fort Jackson and Fort St. Philip, below New Orleans, which in April, 1862, surrendered to the United States forces. General Butler took possession of New Orleans shortly afterwards, and thereupon issued a proclamation in which he declared the city would be governed by martial law until the restoration of the authority of the United States; that all disorders, disturbances of the peace, and crimes of an aggravated nature, interfering with the forces or laws of the United States, would be referred to a military court for trial and punishment; that other misdemeanors would be subject to the municipal authority, if the latter desired to act, and the civil cases between parties would be "referred to the ordinary tribunals."

In January, 1863, General Dow was sued in the Sixth District Court of the City and Parish of New Orleans which was, under General Butler's proclamation, allowed to continue in existence, the judge having taken the oath of allegiance to the United States. The petition stated that Bradish Johnson was a citizen of New York and had been for several years the owner of a plantation and slaves on the lower Mississippi; that September 6, 1862, during his temporary absence, Captain Snell of the 13th Maine, with a force under his command, had stopped at the plantation, taken from it twenty-five hogsheads of sugar,

and had plundered the dwelling house of the plantation of silverware, the private property of the plaintiff, all to the value of more than sixteen hundred dollars; that these "illegal, wanton, oppressive and unjustifiable" acts were perpetrated under the verbal and secret orders of General Dow, "unauthorized by his superiors or by any provision of martial law, or by any requirement of necessity growing out of a state of war." By this "wanton abuse of power" the plaintiff had been wronged, and he prayed judgment against General Dow for the value of the property taken.

To this suit General Dow, though personally served with citation made no appearance nor response and was, therefore, defaulted. The Supreme Court opinion says:

"The Sixth District Court * * * did not seem to consider that it was at all inconsistent with his duty as an officer in the army of the United States, to leave his post at the forts, which guarded the passage of the Mississippi, nearly a hundred miles distant, and attend upon its summons to justify his military orders, or seek counsel or procure evidence for his defence. Nor does it appear to have considered that, if its jurisdiction over him was recognized, there might spring up such a multitude of suits as to keep the officers of the army stationed in its district so busy that they would have little time to look after the enemy and guard against his attacks."

Judgment was rendered against Dow for \$1,454.-81, the determined value of the goods taken, and the costs of the suit. Upon this judgment action was brought in the Circuit Court of the United States for the District of Maine, Dow's home state. The declaration there stated the recovery of the judgment and made profert of an authenticated copy. The defendant pleaded the general issue, *nul tiel* record, and three special pleas. The latter only are important.

Their object was to show the District Court had no jurisdiction to render the judgement in question, for the reason that its district was at the time part of a country in insurrection against the United States. The second plea sets up the history of the secession of Louisiana, her continuance in rebellion, the necessity for the use of the United States Military forces to take possession of that portion of the State embraced in the Sixth judicial district, and hold it by military occupation and martial law; that the defendant as an officer in the military service of the United States, obeyed a general order of the President issued in July, 1862, to military commanders within certain states then in secession, among them Louisiana, directing them to seize and use any property, real or personal, which might be necessary or convenient for their commands as supplies or for other military purposes; that in performance of his duties the defendant commanded troops that by his order seized from the plaintiff, then a citizen of that state, certain goods necessary and convenient as supplies for the army; that for such seizure judgment was rendered against him, but that at that time the District Court had no jurisdiction of the action or over the defendant.

The third plea cites the necessity of military possession and martial law in Louisiana which deprived all courts of that state, including that of the Sixth District, of all jurisdiction except such as should be conferred on them by authority of the officer commanding the United States forces, and that such authority had not given the courts jurisdiction over persons in the military service for acts performed in the line of their duty.

On the defendant's replication that the District Court had lawful jurisdiction to render the judgment in question, two questions arose, viz:

1. Was the replication good and sufficient reply to the special plea? and

2. Did the District Court have jurisdiction to render the judgment given?

The judges of the Circuit Court divided in opinion, and in accordance with statute, the opinion of the presiding judge prevailed, viz: that the replication was a sufficient reply to the special plea and that the District Court did have jurisdiction. The Circuit Court, therefore, gave the plaintiff, Johnson, judgment for \$2,659.67 and costs. The defendant then took the case to the Supreme Court of the United States by a writ of error on a certificate of a division of opinion in the Circuit Court.

THE POINTS OF LAW TO BE DECIDED

As stated by the Court, the important question for determination was: Whether an officer of the army of the United States is liable to a civil action in the local tribunals for injuries resulting from acts ordered by him in his military capacity whilst in the service of the United States, in the enemy's country, upon an allegation of the injured party that the acts were not justified by the necessities of war.

OPINION OF THE COURT

The Court says the main question involved is not at all difficult of solution when reference is made to the character of the civil war. While between different portions of the same nation, this war was accompanied by the general incidents of an international war. The proportions it attained, the formidable armies involved, the fact that the hostile sections were separated from each other by well defined lines, that the Confederate States had a central authority, and that to them belligerent rights had been accorded by the Federal government, as had been

shown by various acts, were among such incidents. The people of the loyal states became enemies of the people of the Confederate states and were liable to be dealt with as such without reference to their individual opinion. Commercial intercourse and correspondence between them was prohibited by enactments of Congress as well as by the accepted doctrines of public law. Contracts between them were suspended, partnerships dissolved, and the courts of each closed to the citizens of the other.

“When, therefore, our armies marched into the country which acknowledged the authority of the Confederate government, that is, into the enemy’s country, their officers and soldiers were not subject to the laws nor amenable to its tribunals for their acts. They were subject to their own government, and only by its laws, administered by its authority, could they be called to account. As was observed in the recent case of *Coleman vs. Tennessee*, it is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its criminal or civil jurisdiction Much more must this exemption prevail where a hostile army invades an enemy’s country. There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy whose country it had invaded. The same reasons for his exemption from criminal prosecutions apply to civil proceedings It is difficult to reason upon a proposition so manifest. If officers or soldiers of the army could be required to leave their posts and troops, upon the summons of every local tribunal, on pain of judgment by default against them, which at the termination of hostilities could be enforced by suits against them in their own states, the efficiency of the army as a hostile force would be utterly destroyed.”

As a necessary consequence of the domination of any portion of an enemy’s country by an invading belligerent, the position of the latter, or his relation

to the local tribunals is not changed. As a necessary consequence, the political relations of the people of such invaded country to their former government are, for the time, severed. But for their protection and benefit, and for the protection and benefit of others not in the military service, the municipal laws affecting private rights of persons and property, and providing for the punishment of crime, are generally allowed to continue in force and to be administered by the ordinary tribunals as before the occupation. They are considered as continuing unless suspended or superseded by the occupying belligerent, but not for the protection or control of the army, its officers or soldiers. These remain subject to the laws of war, and are responsible for their conduct only to their own government, and the tribunals by which those laws are administered. For acts not authorized by the laws of war they may be tried and punished by military tribunals and are amenable to no other except public opinion.

At the time of the seizure of the property in question, New Orleans and the country about had not been restored to its normal relations to the Union by its capture and subjection by our forces. Hostility, ready to break out into insurrection upon favorable opportunity, still existed. The country was under martial law, and its armed occupation gave no jurisdiction to the civil tribunals over the officers and soldiers of the occupying army. General Butler's proclamation authorizing the District Court to exercise jurisdiction over civil cases between parties did not extend to such officers and soldiers. It was not for their control in any way, nor for the settlement of complaints against them, but for the protection and benefit of the inhabitants of the conquered country and others there not in the military service, that the court was allowed to continue in existence.

"If private property there was taken by an officer or soldier of the occupying army, acting in his military capacity, when, by the laws of war, or the proclamation of the commanding general, it should have been exempt from seizure, the owner could have complained to the commander, who might have ordered restitution, or sent the offending party before a military tribunal, as circumstances might have required, or he could have had recourse to the government for redress. But there could be no doubt of the right of the army to appropriate any property there, although belonging to private individuals, which was necessary for its support or convenient for its use. This was a belligerent right, which was not extinguished by the occupation of the country, although the necessity for its existence was thereby lessened. However exempt from seizure on other grounds private property there might have been, it was always subject to be appropriated when required by the necessities or convenience of the army, though the owner of property taken in such cases may have had a just claim against the government for indemnity."

"The special pleas allege that the articles taken under General Dow's orders were seized as necessary and convenient supplies for the occupying army. It was a hostile seizure * * * made in the exercise of a belligerent right upon the propriety or necessity of which the Municipal Court had no authority to adjudge.

"It follows that, in our judgment, the District Court of New Orleans was without jurisdiction to render the judgment in question, and the special pleas in this case constitute a perfect answer to the declaration.

"We fully agree with the presiding justice of the Circuit Court in the doctrine that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is that the law shall alone govern; and to it the military must always yield. We do not controvert the doctrine of

Mitchell vs. Harmony, reported in the 13th of Howard; on the contrary we approve it. But it has no application to the case at bar. The trading for which the seizure was there made had been permitted by the Executive Department of our government. The question here is: What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty."

The decision of the Court was that the replication was not a good and sufficient reply to the special pleas, and that the Sixth District Court of New Orleans, at the time and place mentioned, had not jurisdiction of the parties and cause of action to render the judgment in question. The judgment of the Circuit Court was reversed, and it was ordered that the cause be remanded with directions to that court to enter final judgment for the defendant on the demurrer to the replication.

There were three dissenting opinions. Mr. Justice Swayne dissented only on the question of the jurisdiction of the Supreme Court to review the case, the amount in controversy being less than five thousand dollars. Mr. Justice Clifford and Mr. Justice Miller dissented on the main questions involved. The opinion of the Court was delivered by Mr. Justice Field.

Cases Cited by the Court

Coleman vs. Tennessee, 97 U. S. 509.

The Exchange, 7 Cranch.

Mitchell vs. Harmony, 13 Howard.

Ford vs. Surget, 97 U. S. 594.

Lamar vs. Browne, 92 U. S. 187.

OTHER REPORTS

LeCaux vs. Eden, 2 Douglas 594.

Coolidge vs. Guthrie, 2 Amer. Law Reg. U. S. 22.

Elphinstone vs. Bedreechund, English.

Neely vs. Henkel

Supreme Court of the United States, 1901, 180 U. S. 109

Statement of the Case

Charles F. W. Neely, a citizen of the United States, was accused of having embezzled from the public funds of the Island of Cuba, between July 1, 1899, and May 6, 1900, while holding the office of finance agent of the Department of Posts at Havana, Cuba, sums aggregating \$67,000.00 or more. Before the matter had been fully investigated and action could be taken by the military government of Cuba, then in existence, looking to his arrest and trial, Neely left Cuba and returned to the United States. On June 13, 1900, General Wood, then military governor of Cuba, made requisition upon the President for the extradition of Neely under Section 5270, Revised Statutes of the United States, as amended by act of Congress of June 6, 1900.

Section 5270, Revised Statutes, provides for the surrender of persons accused of crime committed within the jurisdiction of foreign governments with which the United States has a treaty or convention for extradition who may be found within the jurisdiction of the United States. The act of June 6, 1900, extended the provision of the statute to "any foreign territory or country, or any part thereof, occupied by, or under control of the United States." The act enumerates the crimes for the commission of which persons may be so extradited, among them the embezzlement or criminal malversation of the public funds, and provides that the person committing any of the crimes named, who shall depart or flee from

such foreign country or territory under control of or occupied by the United States, to any of the states, territories or the District of Columbia, shall be liable to arrest and detention by authority of the United States, and returned or surrendered for trial under the laws in force where such offense was committed, on the written request or requisition of the military governor, or other chief executive officer in control of such foreign country or territory. The mode of procedure in such cases is laid down in the act which further provides that the authorities in control of the country to which the person is extradited shall secure to him a fair and impartial trial.

On June 28, 1900, Judge Lacombe, of the Circuit Court of the United States for the Southern District of New York, issued two warrants for the arrest of Neely, based upon a verified written complaint of an assistant United States attorney for that district. One warrant was for a violation of Chapter 10, Article 401, of the Penal Code of the Island of Cuba, in force previous to the relinquishment of Cuba by Spain; the other warrant was based upon a violation of Sections 37 and 55 of the Postal Code of Cuba, promulgated July 21, 1899, by General Brooke, then military governor of the island. The warrants directed that Neely be brought before the Court in order that evidence of probable cause as to his guilt might be heard and considered, and if deemed sufficient, that the proceedings for his extradition might be completed.

Upon Neely's arrest, application was made by the United States for his extradition to Cuba. Motion to dismiss the complaint on various grounds was denied and the case heard upon evidence. Judge Lacombe found probable cause to believe Neely guilty of the offense of embezzlement, obnoxious to Article 401 of the Penal Code of Cuba. The con-

tention that as this code was promulgated under Spanish rule, the article referred to applies only to persons in the public employ of Spain, was set aside by Judge Lacombe as without merit, since Spain, having withdrawn from the island, its successor has become the "public" to which the code, remaining unrepealed, now refers. The Court decreed that upon the discontinuance of other proceedings against Neely, then before it, growing out of the same offense, the order in extradition would be signed.

Neely subsequently applied to the Circuit Court of Appeals for a writ of *habeas corpus* on various grounds based upon the contention that the act of June 6, 1900, was in violation of the Constitution of the United States. This application was denied and an appeal was then taken by Neely to the Supreme Court of the United States.

THE POINTS OF LAW TO BE DECIDED.

The following points of law were decided by the Supreme Court in this case:

I. Whether Cuba is to be deemed a foreign country or territory within the meaning of the act of June 6, 1900.

II. Whether the said act is unconstitutional and void in that it does not secure to the accused, when surrendered to a foreign country for trial in the tribunals of that country, all of the rights, privileges and immunities guaranteed by the Constitution of the United States to persons charged with the commission in this country of crimes against the United States; for example, the right of a trial by jury, the privilege of the writ of *habeas corpus*, and in general the fundamental guarantees of life, liberty and property embraced in that instrument.

III. Whether, since peace had existed in Cuba, at least since the forces of Spain evacuated the Island

in January, 1899, the occupancy and control of that Island under the military authority of the United States was without warrant in the Constitution, and an unauthorized interference with a friendly power; and the courts established under orders issued by the Military Governor therefore incompetent and not such as to warrant extradition of alleged criminals for trial therein.

OPINION OF THE COURT

The opinion was delivered by Mr. Justice Harlan.

I. As to the first question: The Court took judicial notice that at the date of the act, June 6, 1900, Cuba was "occupied by" and was "under control of the United States." Whether the act applies to the present case depends upon the inquiry whether, within the meaning of that act, Cuba is to be deemed a foreign country or territory. An answer to this is found if we look to the avowed objects of the war with Spain and the military occupation of that island. Those objects are disclosed by official documents and by the public acts of the representatives of the United States, as for instance the following:

(a) The joint resolution of Congress, passed April 20, 1898, which, after reciting the then conditions existing in Cuba, declared that the people of Cuba "are and of right ought to be free and independent," demanded that Spain at once relinquish its authority over the Island; directed the President to use the military and naval forces of the United States to effect that object; and disclaimed any intention to do otherwise than to aid the people of Cuba in establishing a government of their own.

(b) The act of Congress of April 25, 1898, declaring war against Spain.

(c) The treaty of Paris, signed December 13, 1898, the first article of which clearly shows that the

occupation of Cuba by the United States was but of a temporary nature to be terminated by "any government established in the Island."

(d) The order of December 13, 1898, which by direction of the President established the Division of Cuba and placed General Brooke in command of the troops therein, and directed him to exercise the authority of Military Governor of the Island.

The proclamation of General Brooke, issued upon assuming the office of Military Governor, in which he recited the benevolent intentions of the United States towards the people of Cuba, and declared that the humanitarian objects of the United States government would be sought "through the channels of civil administration, although under military control, in the interest of and for the benefit of all the people of Cuba". In this proclamation, General Brooke declared that the civil and criminal code which prevailed under Spanish sovereignty would remain in force with such modifications and changes as might from time to time be found necessary.

Under date of January 11, 1899, the Military Governor ordered that the civil government should be administered by four departments. Subsequently a supreme court for the Island was created, and the jurisdiction of the ordinary courts was defined.

July 21, 1899, the Postal Code of Cuba was promulgated by direction of the Military Governor. This, among other provisions, defined numerous criminal offenses and fixed the punishment for each. It was not disputed that one of the offenses charged against Neeley was included in this Code, nor that the other offense was embraced by the Penal Code of Cuba, in force when the United States declared war against Spain.

"The facts above detailed make it clear that within the meaning of the act of June 6, 1900, Cuba

is foreign territory. It cannot be regarded in any constitutional, legal, or international sense as a part of the territory of the United States."

War was declared between this country and Spain, not for the purpose of making Cuba a part of the United States, but only for the purpose of compelling Spain to withdraw from Cuba. Congress expressly disclaimed any object other than that of leaving Cuba to a government of its own people. Nothing has been done by the United States authorities inconsistent with such declared objects and intentions.

The occupancy of the Island by troops of the United States was the necessary result of the war, and could not have been avoided consistently with the principles of international law or the obligations of the United States to the people of Cuba.

"Cuba is none the less foreign territory within the meaning of the act of Congress because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that Island to establish a government of their own under which as a free and independent people they may control their own affairs."

As between the United States and all foreign nations, including Spain, Cuba, after the treaty of Paris, was to be treated as if it were conquered territory.

"But as between the United States and Cuba, that Island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action."

When the United States forced Spain to relinquish her sovereignty and determined to occupy and control that Island until the people of Cuba had

established a stable government and assured tranquility within their borders, it succeeded to the authority of the displaced government at least in so far that it became its duty under international law to protect the liberty and property of all those who submitted to the authority of the representatives of this country. That duty was recognized in the treaty of Paris, and the act of June 6, 1900, in so far as it applied to cases arising in Cuba, was in aid or execution of that treaty.

“The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8, of Article 1 of the Constitution, as all others vested in the government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President, by and with the advice and consent of the Senate, to insert in a treaty with a foreign power. What legislation by Congress could be more appropriate for the protection of life and property in Cuba, while occupied and controlled by the United States, than legislation securing the return to that Island to be tried by its constituted authorities, of those who having committed crimes there fled to this country to escape arrest, trial and punishment.”

No crime is mentioned in the act of June 6, 1900, that does not have some relation to the safety of life and property, and the provisions of that act requiring the surrender of embezzlers had special application to Cuba in its then relations to this country.

The Court adjudges that it was competent for Congress to give efficacy to the provisions of the Treaty of Paris by legislation, but does not express an opinion that but for the obligations imposed by that treaty Congress would have been without power to enact such a statute as that of June 6, 1900, in so far as it embraced citizens of the United States, or

persons found in the United States who had committed crimes in foreign country so controlled by the United States for temporary purposes.

II. As to the second question: The rights, privileges and immunities guaranteed by the Constitution to persons charged with the commission of crime, apply only when the crimes are committed in the United States, and have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country. The fact that Neely is a citizen of the United States did not give him an immunity to commit crime in other countries, nor to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he violated.

“When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.”

Only by the order of a judge of a court of the United States can the person affected be extradited, and then only upon evidence establishing a probability of guilt, and the act in question secures him “a fair and impartial trial.” This is not taken to mean necessarily a trial according to the mode prescribed by this country, but one according to the mode followed in the country where the crime was committed, provided there be no discrimination against the accused because of his American citizenship. Congress judged the provisions of the act adequate to the ends of justice, and the Court cannot adjudge that Congress has abused its discretion, nor can it decline to enforce obedience to its will as expressed by said act.

III. As to this question: It is not competent for the judiciary to make any declaration as to the length of time Cuba might be occupied and controlled by the United States in order to effect its pacification. This is a function of the political branch of the Government. The contention of the appellant that the United States recognized the existence of the Republic of Cuba, and that it carried on the war with Spain with its own forces and, as allies, those of that republic, but was, after such war was ended, using its military and executive power to overthrow such republic, is without merit. The declaration of Congress that the people of Cuba were and of right ought to be free and independent, was not intended as a recognition of the existence of an organized government instituted by the people of Cuba in hostility to that maintained by Spain. Its meaning was simply that the Cubans were entitled to that "measure of self control which is the inalienable right of man." This meaning is expressed in the references made to Cuba by President McKinley in his messages to Congress of December 5, 1897, and April 11, 1898, both placed before Congress previously to the passage of the resolution in question. It is a significant fact that the joint resolution as originally reported from the Senate committee contained the added clause, "and that the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of the Island," and that upon full consideration, the views of President McKinley as set forth in the messages above referred to, received the sanction of Congress and the clause just quoted was stricken out. Thus both the legislative and executive branches of the government concurred in not recognizing the existence of any such government as the "Republic of Cuba." While Cuban troops under Cuban officers coöperated with the troops of the

United States in overthrowing Spanish rule, the supreme authority in all military and naval operations was entirely with the United States.

“We are of the opinion, for the reasons stated, that the act of June 6, 1900, is not in violation of the Constitution of the United States, and that this case comes within the provisions of that act. The Court below, having found that there was probable cause to find the appellant guilty of the offenses charged, the order for his extradition was proper, and no ground existed for his discharge on habeas corpus. The judgment of the Circuit Court is therefore affirmed.”

A second application for a writ of habeas corpus was argued with the above case. Mr. Justice Harlan, who here also delivered the opinion of the Court, says that the application was upon substantially the same grounds as were urged in the above case. The additional allegations in this application did not materially change the situation. For the reasons stated in the opinion quoted, the judgment of the lower Court in this case also was affirmed.

NOTES

1. In *United States vs. Rice*, 4 Wheaton 246 (1819), where the question was as to whether goods which had been imported into Castine, Maine, during the time of the British occupancy, and duties paid thereon were again chargeable with duties by the United States upon reoccupation of the territory, the Supreme Court of the United States held that when a conquering and occupying power secures and holds a portion of the territory of an enemy with which it is at war, none of the laws of the displaced authority have any effect over the inhabitants of the occupied territory; that only such laws as the conquering and occupying power chooses to recognize and impose bind the inhabitants of an occupied power.

2. In *Texas vs. White*, 7 Wallace 700 (1868),

which was an original bill before the Supreme Court of the United States to secure the return to the State of Texas of certain United States bonds, the property of that State, the same having been illegally disposed of during the Civil War by the insurrectionary government thereof, the Court held that, in general, acts of a State legislature, organized in hostility to the United States, intended to aid rebellion are void, while acts necessary to preserve peace and good order are valid.

Rights Regarding Private Property

Brown vs. United States
Supreme Court of the United States, 1814, 8 Cranch 110

Statement of the Case

The *Emulous*, owned by John Delano and other citizens of the United States, was chartered to an English company with one American member to carry a cargo from Savannah to Plymouth, England.

When loaded, the vessel was stopped in port by the embargo of April 4, 1812.

April 25th the captain of the ship and the agent of the shippers agreed that she should go with her cargo to New Bedford, where her owners resided, and remain there without prejudice to the charter party.

The *Emulous* went to New Bedford and remained there until after the declaration of war.

In October or November the ship was unloaded, and the cargo, except some pine timber, which constituted part of the cargo, was landed.

The pine timber was floated up a salt water creek where, at low tide, the ends of the timber rested on the mud. It was prevented from floating out with the tide by impediments placed in the entrance of the creek.

November 7, 1812, the agent of the owners, an American citizen, sold the cargo to Armitz Brown, also an American citizen.

April 19th, a libel was filed by the attorney for the United States in the District Court of Massachusetts against the cargo, in behalf of the United States and John Delano and all other persons concerned.

It does not appear that the President of the United States ordered this seizure nor that it had his sanction, unless it must be implied from the fact that the libel was filed and prosecuted by the law officer who represented the government.

It was admitted that the seizure was made by an individual, and the libel filed at his request by the district attorney.

The property was claimed by Armitz Brown, under the purchase made in the November preceding.

The United States District Court dismissed the libel; the Circuit Court reversed this sentence and condemned the pine timber as enemy's property forfeited to the United States.

From the sentence of the Circuit Court the claimant appealed to the Supreme Court.

THE POINTS OF LAW TO BE DECIDED

1. May enemy's property found on land at the commencement of hostilities be seized and condemned as a necessary consequence of the declaration of war?

2. Is there any legislative act which authorizes such seizure and condemnation?

3. Was the pine timber on land?

These questions are answered:

1. Negative.
2. Negative.
3. Affirmative.

OPINION OF THE COURT

* * * * *

The material question made at bar is this: Can the pine timber, even admitting the property not to be changed by the sale in November, be condemned as prize of war?

The cargo of the *Emulous*, having been legally acquired and put on board the vessel, having been detained by an embargo not intended to act on foreign property, the vessel having sailed before the

war from Savannah, under a stipulation to reland the cargo in some port of the United States, the relanding having been made with respect to the residue of the cargo, and the pine timber having been floated into shallow water, where it was secured and in the custody of the owner of the ship, an American citizen, the Court cannot perceive any solid distinction, so far as respects confiscation, between this property and other British property found on land at the commencement of hostilities. It will, therefore, be considered as a question relating to such property generally, and be governed by the same rule.

Respecting the power of government, no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court. * * *

Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask, —

Is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power?

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction; and, although in practice vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace, in the course of trade. Such a proceeding is rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The inquiry is, whether such property vests in the sovereign by the mere declaration of war, or remains subject to the rights of confiscation, the exercise of which depends on the national will; and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and on other property found within the country must be the same. What, then, is this operation? * * *

The modern rule, then, would seem to be, that tangible property belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property.

This rule appears to be totally incompatible with the idea, that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right.

The Constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that Constitution, a construction ought not lightly to be

admitted, which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us.

If we look to the Constitution itself, we find this general reasoning much strengthened by the words of that instrument.

That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumeration of powers, which accompanies that of declaring war. "Congress shall have power * * * To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water, is to be restricted to captures which are extraterritorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress of the power in question as an independent substantive power, not included in that of declaring war.

The acts of Congress furnish many instances of an opinion that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found, at the time, within the territory.

War gives an equal right over persons and property; and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property. The act concerning alien enemies, which confers on the President very great discretionary powers respecting their persons, affords a strong

implication that he did not possess those powers by virtue of the declaration of war.

The "act for the safe keeping and accommodation of prisoners of war", is of the same character.

The act prohibiting trade with the enemy, contains this clause; "And be it further enacted, that the President of the United States be, and he is hereby authorized to give, at any time within six months after the passage 'of this act', passports for the safe transportation of any ship or other property belonging to British subjects, and which is now within the limits of the United States."

The phraseology of this law shows that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act confers on the President, is manifestly considered as one which he did not previously possess.

The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt. Is there, in the act of Congress, by which war is declared against Great Britain, any expression which would indicate such an intention?

That act after placing the two nations in a state of war, authorizes the President of the United States to use the whole land and naval force of the United States to carry the war into effect, and "to issue to private armed vessels of the United States, commissions or letters of marque and general reprisal against the vessels, goods, and effects of the government of the United Kingdom of Great Britain and Ireland, and the subjects thereof".

That reprisals may be made on enemy property found within the United States at the declaration of war if such be the will of the nation, has been admitted; but it is not admitted that, in the declaration of war, the nation has expressed its will to that effect.

It cannot be necessary to employ argument in showing that when the attorney for the United States

institutes proceedings at law for the confiscation of enemy property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel.

The "act concerning letters of marque, prizes, and prize goods", certainly contains nothing to authorize this seizure.

There being no other act of Congress which bears upon the subject, it is considered as proved that the legislature has not confiscated enemy property which was within the United States at the declaration of war, and that this sentence of condemnation cannot be sustained.

One view, however, has been taken of this subject, which deserves to be further considered.

It is urged that, in executing the laws of war, the executive may seize and the courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons, at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

Commercial nations in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather

of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.

It appears to the Court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war. The Court is therefore of opinion that there is error in the sentence of condemnation pronounced in the Circuit Court in this case, and doth direct that the same be reversed and annulled, and that the sentence of the District Court be affirmed.

Citations

- 1 Stats. at Large 577.
- 2 Stats. at Large 700, 777, 778.

NOTES

1. *Miller vs. United States*, 11 Wallace 268, (1870). This was a proceeding under the Acts of Congress August 6th, 1861, and July 17th, 1862, (See Birkhimer's Military Government and Martial Law, Sec. 181) to confiscate certain shares of stock of the Michigan Southern & Northern Indiana Railroad Company and the Detroit, Monroe & Toledo Railroad Company, all bonds and coupons thereto attached, all dividends and all interest or other money due thereon, the whole belonging to Samuel Miller of Amherst County, Virginia. The stock, etc., was seized on the order of the District Attorney for the Eastern District of Michigan by the United States marshal for the District, the latter making the return of seizure on the 6th of February, 1864. A libel against the stock, etc., was filed by the District Attorney in the District Court on the 27th of February, 1864. The libel alleged facts to put the case under the terms of the Act of August 6th, 1861 and some

of the sections of the Act of July 17th, 1862. At the hearing before the District Court the proof produced consisted of an *ex parte* affidavit of one Thatcher to the effect that he had had a conversation with Miller near Lynchburg, Va., about July 1st, 1863, in which Miller told him that he approved of the acts of the Confederacy, would be willing to bear sacrifices with them and was then giving one-tenth of all his income for the support of the Confederacy, besides making other contributions to support the families of soldiers in arms. Subsequent application was made to the Court to open the decree of condemnation and forfeiture upon affidavits which tended to confirm the loyalty of Miller but same was denied. On error to the Circuit Court the decree was affirmed. Appealed to the Supreme Court. There was no personal service upon Miller nor on anyone professing to represent him. No one appeared in his behalf or in defence of the proceeding before the District Court.

The following points, among others, were determined by the Supreme Court of the United States;

(a) If the statutes are an exercise of the war powers of the government it is clear that they are not affected by the restrictions imposed by the fifth and sixth amendments of the Constitution. The question therefore is whether the action of Congress was a legitimate exercise of the war power. There is little question that the act of 1861 is an exercise of the war power, and that the first four sections of the act of 1862 are an exercise of sovereign and not belligerent rights. The question as to whether the fifth, sixth and seventh sections of the act of 1862 are an exercise of the war power must be determined by the nature of the statute and the proceedings under them.

This act was an act "to seize and confiscate the property of rebels" and for other purposes, and the Fifth Section enacts: "That to insure the speedy termination of the present rebellion, it shall be the duty of the President to cause the seizure of estates, property, etc." The avowed purpose of all this was, not to reach any criminal personally, but to "insure the speedy termination of the rebellion" then present, which was a war which Congress had recognized as

a war, and which this Court has decided was then a war. The purpose avowed then was legitimate, such as Congress in the situation of the country might constitutionally entertain, and the provisions made to carry out the purpose, viz., confiscation, were legitimate.

(b) The power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and has always been an undoubted belligerent right. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial whether its owner be an alien or a friend or even a citizen or subject of the power that attempts to appropriate the property.

Any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use is a proper subject of confiscation.

When the acts of 1861 and 1862 were passed, there was a state of war existing between the United States and the rebellious portions of the country. War existing, the United States were invested with belligerent rights in addition to the sovereign powers previously held. Because a civil war existed, the government was not shorn of any of those rights that belong to belligerency.

(c) It would be absurd to hold that, while in a foreign war enemy's property may be captured and confiscated as a means of bringing the struggle to a successful conclusion, in a civil war of equal dimensions requiring quite as urgently the employment of all means to weaken the belligerent in arms against the government the right to confiscate the property that may strengthen such belligerent does not exist. There is no such distinction to be made. Every reason for the allowance of a right to confiscate in case of foreign wars exists in full force when the war is domestic or civil.

It must be that when a rebellion has become a regarded war those who are engaged in it are to be recognized as enemies, and that, although the laws of nations have not defined who, in case of a civil war, are to be regarded as and may be treated as enemies, yet, clearly, those must be considered such, who, though subjects or citizens of the lawful government, are residents of the the territory under the power or control of the party resisting that government.

(d) Because under the statute of 1862 the property of all enemies was not made liable to confiscation was no reason for inferring that it was not intended to confiscate the property of enemies at all; it was competent for Congress to determine how far it would exercise belligerent rights.

The express declaration of the Seventh Section of the act was that the property of all persons described in the Fifth, Sixth and Seventh Sections should be condemned as enemies' property; it was therefore as enemies' property and not as offenders against the municipal law, that the statute directed its confiscation.

The Court decided that the confiscation acts were constitutional and that there was no error in the proceedings of the courts below in the case.

2. *Tyler vs. Defrees*, 11 Wallace 331 (1870). Error to the Supreme Court of the District of Columbia. This was an action of ejectment to recover certain real property in the city of Washington. The defendant pleaded title from a purchaser at a sale of the property under a judicial decree made in proceedings instituted under the Confiscation Act of July 17, 1862.

The doctrine of *Miller vs. U. S.* (*supra*) was affirmed and applied.

The Supreme Court of the United States, in connection with the case, say:

"We do not believe that the Congress of the United States, to which is confided all the great powers essential to a perpetual union—the power to make war, to suppress insurrection, to levy taxes, to make rules concerning captures on land and water—is deprived of these powers when the necessity for their exercise is called out by domestic insurrection

and internal civil war—when States, forgetting their constitutional obligations, make war against the nation, and confederate together for its destruction.”

3. *Williams vs. Bruffy*, 96 U. S. 176 (1877). This was an action in assumpsit brought in the Virginia State Courts for certain goods sold by the plaintiffs, citizens and residents of Pennsylvania, to Bruffy, a citizen and resident of Virginia, in March, 1861. In August, 1861, after the beginning of the Civil War, the government of the Confederate States enacted a law sequestrating all lands, tenements, goods, chattels, rights and credits of alien enemies that might be found within their limits. Conforming to a decree of a Confederate District Court given under this act, Bruffy paid the debt owing to Williams for the goods to an agent of the Confederate States.

After the war Bruffy's estate was sued for the debt. The Virginia Courts found for the defendants. Appeal to the Supreme Court of the United States.

The Supreme Court said that the government of the Confederate States belonged to that class of *de facto* governments which result from an attempt of a part of a state to separate from the remainder and set up a distinct and independent nation. The validity of the acts and laws of such governments depends upon whether the rebellion is successful or not. The Confederate government had failed to make good and consequently its laws were of no effect from the very beginning. The only validity which this sequestration law possessed, therefore, was to be attributed to the sanction which the State of Virginia had given it. It was in effect a law of the State, though it had not been enacted as such by the State Legislature. But Virginia had always been bound by the Federal Constitution, though she and the others joining with her in the confederation denied it. The sequestration act was then a law enforced by the State impairing the obligations of a contract and depriving the citizens of other States of the privileges and immunities enjoyed by the citizens of that State in violation of the Federal Constitution and hence void from the beginning.

The Court recognized the fact that there were laws in force in the Confederacy which the futility

of resistance and the interests of good order made it a necessity and a duty for individuals to obey. But a debt legally owing to a citizen of a loyal State could not be wiped out by the enforced payment of an equivalent sum to an illegal organization.

Planter's Bank vs. Union Bank

Supreme Court of the United States, 1872, 16 Wallace 483

Statement of the Case

In May, 1862, when New Orleans was recaptured by the Union forces, a considerable balance was due the Planter's Bank of Tennessee from the Union Bank of Louisiana, a New Orleans Bank, on account of various drafts and claims forwarded by the Planters' Bank to the Union Bank for collection, it being understood between the two banks that all collections, etc., were to be in Confederate currency.

After taking the city, General Butler issued a proclamation, which stated: "All the rights of property of whatever kind, will be held inviolate, subject only to the laws of the United States."

During 1861 and 1862, Congress passed several acts providing for the capture and confiscation of property of rebels, but neither of the acts gave authority to military commanders to seize such property nor did they make the property of any incorporated banks liable to such seizure.

On August 17th, 1863, an order was issued by General Banks, then department commander, requiring the various banks of New Orleans, to pay over to the Chief Quartermaster of the army all money in their possession belonging to, or standing on their books to the credit of, any corporation, association, or pretended government in hostility to the United States, and all moneys belonging to any person registered as an enemy of the United States, or engaged in any manner in the military, naval, or civil service of the Confederate States, or who should have been,

or might thereafter be convicted of rendering aid or comfort to the enemies of the United States.

Under this order the Union Bank paid to the quartermaster department the entire balance due the Planters Bank, \$211,774.00, on Sept. 10, 1863.

All moneys so turned in, were, by the terms of the order, to be held by the Quartermaster's Department subject to future adjudication by the United States.

On Sept. 15th, 1863, the Planter's Bank drew on the Union Bank for \$86,646.00 the sum in Federal money considered due.

The Union Bank refused to pay, alleging the seizure, as above set forth.

The Planter's Bank thereupon brought suit in the Circuit Court of the District of Louisiana for recovery.

Upon the first trial, a jury found for the plaintiff for the amount claimed, in full, with interest. This was in February, 1868. The amount allowed was \$113,296.00.

In January, 1871, a new trial was had. The defendant claimed

1st: That commanding generals had the legal power to seize and take possession of the property and effects of rebels.

2nd: That the payment under compulsion in this case was a valid discharge of the liability.

The defendant requested among other legal points that the jury be charged that the amount of the indebtedness was the value of the Confederate currency in lawful money of the United States, at the time the credit was entered on the books of the Union Bank. The court however, charged that the indebtedness was the value of the amount of Confederate currency translated into United States currency at the time of demand for payment by the Planter's Bank.

The jury found for the plaintiff in the sum of \$24,713.

The case was carried to the Supreme Court on assignment of error by both parties to the suit, and was decided in the December term, 1872.

THE POINTS OF LAW TO BE DECIDED

1. Was the order of General Banks valid, under the particular circumstances of this case, having in mind the prior proclamation of General Butler respecting private property, and the acts of Congress of 1861 and 1862.

2. Was the payment in Confederate currency, and the quartermaster's acceptance in discharge of the balance, a satisfaction of the claim of the plaintiffs.

There were also certain strictly legal technical questions of no particular interest to the military profession, which need not here be considered.

OPINION OF THE COURT

The court said, in part:

"Whether the payment in Confederate notes and the quartermaster's acceptance of them in discharge of the balance was a satisfaction of the claim of the plaintiffs upon the defendants is a controlling question in the case." * * * "But a grave question lies back of this. Did the order of General Banks justify any payment of the balance to the military authorities? If it did not, it is immaterial in what currency the payment was made. Payment in any currency was no protection to the debtors. The validity of the order is; therefore, the first thing to be considered. It was made, as we have seen, on the 17th of August, 1863. Then the city of New Orleans was in quiet possession of the United States forces. It had been captured more than fifteen months before that time, and undisturbed possession was maintained ever after its capture. Hence the order was no attempt to seize property '*flagrante bello*' nor was

it a seizure for the immediate use of the army. It was simply an attempt to confiscate private property, which, though it may be subjected to confiscation by legislative authority, is, according to the modern law of nations, exempt from capture as booty of war. Still, as the war had not ceased, though it was not flagrant in the district, and as General Banks was in command of the district, it must be conceded that he had power to do all that the laws of war permitted, except so far as he was restrained by the pledged faith of his government, or by the effect of Congress on all legislation. A pledge however, had been given that rights of property should be respected."

Here the decision quotes the proclamation of General Butler, and continues:

"We do not assert that anything in General Butler's proclamation exempted property within the occupied district from liability to confiscation as enemies property, if in truth it was such. All that is now said is that after that proclamation private property in the district was not subject to military seizure as booty of war."

Referring then to the confiscation of private property, as a general question, that decision states that it was possible only as laid down in the acts of Congress of August 6th, 1861, and July 17th, 1862, that the system therein laid down was exclusive, and that no authority was therein given to a military commander, as such, to effect any confiscation. And under neither of the acts was the property of a bank made confiscable.

The decision further continues, "It does, indeed, appear to be a principle of international law that a conquering state, after the conquest has subsided into government, may exact payment from the state debtors of the conquered power, and that payments to the conqueror discharge the debt, so that when the former government returns the debtor is not compelled to pay again. This is the doctrine

stated in Phillimore on International Law. But the principle has no applicability to debts not due to the conquered state. Neither Phillimore nor Bynkershoek, whom he cites, asserts that the conquering state succeeds to the rights of a private creditor.

"It follows then that the order of General Banks was one which he had no authority to make, and that his direction to the Union Bank to pay to the quartermaster of the army the debt due the Planters' bank was wholly invalid. * * * If the order was invalid, payment to the quartermaster did not satisfy the debt."

The court then dealt with the strictly legal questions involved, decided that the amount in controversy was properly the value of the Confederate notes in United States currency at the time when the demand for payment was made, and that the charge to the jury had been correctly made, this being one of the assignments of error.

The judgment was affirmed, Mr. Justice Bradley dissenting, in a very brief but apparently logical argument to the general effect that the confiscation had in fact been made, and that the Federal government had substantially adopted and confirmed the acts of the military authorities, and was therefore responsible for any illegality; that the debtor having been forced to pay to the military should not be compelled to again pay to the creditor, but that the latter should seek relief from the Federal government, such disposition being in his judgment more in accord with the principles of international law, and the mutual rights and relations of all parties concerned.

Cases Cited by the Supreme Court

1. The Venice, 2 Wall. 258.
2. Thorington vs. Smith, 8 Wall. 13.
3. Bowden vs. Horne, 7 Bingham 716.

4. Faikney vs. Reynous, 4 Burrow 2069.
5. Lestapies vs. Ingraham, 5 Barr 71.
6. Robinson vs. Noble's Administrators, 8
Peters 181.

Gates vs. Goodloe

Supreme Court of the United States, 1879, 101 U. S. 612

Statement of the Case

Error to the Supreme Court of the State of Tennessee.

In 1859 the firm of Gates, Wood and McKnight, of Memphis, Tennessee, leased a storehouse in that city for 5 years from R. C. Brinkley, the testator of Goodloe, executing their several promissory notes, payable quarterly, to cover the rent for the entire period of the lease.

Union troops took possession of Memphis, June 6, 1862. In August of that year General Sherman, commanding in Memphis, and upon the order of General Grant, his immediate superior, directed the local quartermaster to collect the rents of all buildings whose owners had "gone South". General Sherman issued instructions as follows:

"Rent must be paid to the Quartermaster. No agent can collect and remit money South without subjecting himself to arrest and trial for aiding and abetting the public enemy.

"I understand that General Grant takes the rents and profits of this class of real property, under the rules and laws of war, and not under the Confiscation Act of Congress, therefore the question of title is not involved—simply the possession, and the rent and profits of houses belonging to our enemies, which are not vacant, we hold in trust for them, or the government according to the future decision of the proper tribunals.

"We have nothing to do with confiscation. We only deal with possession, and, therefore, the neces-

sity of a strict accountability, because the United States assumes the place of trustee, and must account to the rightful owner for his property, rents, and profits. In due season courts will be established to execute the laws, the Confiscation Act included, when we will be relieved of this duty and trust. Until that time every opportunity should be given to the wavering and disloyal to return to their allegiance to the Constitution of their birth and adoption."

Brinkley left Memphis upon the approach of the Union troops, and remained within the Confederate lines until 1864. In 1861, he was a member of a Confederate military board. He had also contributed towards the equipment of companies organized to serve against the United States.

Gates, Wood and McKnight refused to make the payments of rent to the Quartermaster, and were accordingly dispossessed by the military authorities. Until July 11, 1863, the property remained in the control of the United States, the firm being permitted to make no use thereof, nor collections from those to whom portions had been sublet.

Suit was finally brought against Gates, Wood and McKnight to compel payment on their outstanding rental notes, and through the Supreme Court of Tennessee decisions were rendered against them.

Claiming a right or immunity in virtue of an authority exercised under the United States and denied them by the state courts, the case went on error to the Supreme Court of the United States.

THE POINT OF LAW TO BE DECIDED

Are the lessees liable to the estate of Brinkley for rent, as stipulated in the lease of 1859, for the period when the storehouse was under the control of the federal military?

The Court decided that the lessees were not so liable.

OPINION OF THE COURT

Mr. Justice Harlan delivered the opinion which, upon the merits of the case, was as follows:

* * * "The Supreme Court of Tennessee was of opinion that the lessees were not discharged from liability upon their contract with Brinkley by reason of the action taken by the military authorities touching the rents accruing from the property in question. That Court recognized the hardship of the case upon the lessees, but consistently with its views of the law the relief asked for could not be given.

"We are unable to give our assent to the conclusion reached by that learned Court. It is inconsistent with our decision in *Harrison vs. Myers* (92 U. S. 111), where we held that the lessee was discharged from liability to the lessor for rent of certain property in New Orleans during the period when the rents and profits arising therefrom were required by the federal military authorities, occupying and controlling that city in the year 1862, to be paid directly to them. There is some difference in the facts of the two cases, but in their essential features they are alike. That case, it may be here observed, was determined in this Court after the rendition of the present decree by the Supreme Court of Tennessee.

* * * * *

"When he (Brinkley) abandoned his home and entered the military lines of the enemy, he was, beyond question, in full sympathy and active coöperation with those who sought, by armed force, to overthrow the Union. Neither in his answer nor in his deposition does he intimate that he had any sympathy with the United States in its efforts to suppress insurrection. He was, therefore, in the very fullest legal sense, an enemy of the government during his stay within the military lines of the rebellion, liable to be treated as such, both as to his person and property. His remaining there was in plain violation of law and disregard of duty. In *The William Bagaley* (5 Wallace 377), we said that 'it was the duty of a citizen when war breaks out, if it be a foreign war

and he is abroad, to return without delay; and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable, and adhere to the regular established government.'

"The general commanding the Union forces at Memphis was charged with the duty of suppressing rebellion by all the means which the usages of modern warfare permitted. To that end he represented for the time and in that locality the military power of the nation. He did not assume authority to confiscate Brinkley's rents, nor did he seize them as booty of war, but, by his subordinates, collected and held them subject to such disposition as might be thereafter made of them by the decisions of the proper tribunals. They were seized, *flagrante bello*, in that portion of the territory of the United States the inhabitants whereof had been declared to be in insurrection. There was no such 'substantial, complete and permanent military occupation and control' as has been sometimes held to draw after it a full measure of protection to persons and property at the place of military operations. (16 Wallace 495.) No pledge had then been given by the constituted authorities of the government which prevented the commander of the Union forces from doing all that the laws of war authorized, and that, in his judgment, under the circumstances attending his situation, was necessary or conducive to the successful prosecution of the war. He was not bound to risk the possibility of Brinkley's rents being transmitted to him beyond the Union lines. To have permitted the latter to enjoy the benefit of them in any form during his voluntary absence within the military lines of the insurrection might have encouraged him to remain under the protection of the enemy, adding by his presence and means to the enemy's ability to continue the struggle against the government. If, therefore, in the judgment of the commanding general, the security of his own army, or the diminution of the enemy's resources, required that he should prevent those within the Confederate military lines from receiving or using in any way, while there, rents accruing from real estate within the federal lines, it would be difficult to show that the

mode adopted by him to effect that result was not a proper military precaution, entirely consistent with the established rules of war, and having direct connection with the great end sought to be accomplished by the war; to-wit, the destruction of armed rebellion, and the complete restoration of the national authority over the insurrectionary district.

"The action of the military authorities in seizing the rents arising from the property which Brinkley had leased to Gates, Wood & McKnight not being, then, in violation of law,—that which was done being regarded as having been done by the authority of the United States in lawful defence of the national existence against armed insurrection,—it results, necessarily, as we think, that the lessees, when dispossessed by military authority and deprived of all future use and control of the leased property, were discharged from liability to the lessors for rent accruing during, at least, the period of such dispossession. They were not discharged from liability for rent which had previously accrued. But since the consideration for their promise to pay rent, from time to time, was the possession and use of the leased property during the term and upon the conditions specified in the lease, and since such enjoyment and use were materially interrupted and prevented by the interference of the law, or of lawful public authority, to which both parties were amenable, the lessees, it seems to the court, ought to be protected against liability for the rent stipulated in the contract of 1859, for the period they were thus kept out of possession and enjoyment of the property. The events and contingencies causing that result were not such as the parties anticipated, nor such as we can suppose were in contemplation when the contract was made. Otherwise they would, it must be assumed, have been provided for in the contract.

"The conclusion thus reached is abundantly sustained by authority. Indeed, many of the authorities would justify us in holding the action of the military authorities to have worked the dissolution of the entire contract of lease from the moment the lessees were dispossessed."

* * * * *

"The decree of the Supreme Court of Tennessee will be reversed, with directions to enter, or cause to be entered in the proper court, a decree of perpetual injunction in accordance with the principles of this opinion; and it is

"So ordered."

Cases Cited in Support of Decision

Harrison vs. Myers, 92 U. S. 111.

The William Bagalay, 5 Wall. 377, 16 Wall. 495.

Melville vs. DeWolfe, 4 El. & Bl. 844.

Exposito vs. Bowden, 7 id. 763.

Barker vs. Hodgson, 3 Mos. & S. 267.

Coolidge vs. Guthrie

**Circuit Court, Southern District of Ohio, 1868, Federal Case
3,185**

Statement of the Case

This case deals with the right of an officer in command of troops to seize and capture enemy property in enemy country and the question of title to such property and the liability of the captor to trial by the Municipal Courts. The case arose as follows: On July 12, 1862, General Samuel R. Curtis, an officer in command of a Union Army, entered and occupied the town of Helena, Arkansas, the State being at that time in rebellion against the United States and the Civil war having by that time assumed the proportions of, and been recognized by the United States as, a public war with a foreign power. By order of General Curtis a considerable quantity of cotton grown on farms belonging to Gideon J. Pillow, a Brigadier General in the Confederate army, was seized and brought to Helena and, after several days, was, on July 26, 1862, sold to the defendant Guthrie and one Babcock in equal amounts and the proceeds of the sale converted to public use. At the time of capture the cotton was owned by Coolidge who though a resident of Arkansas was in no wise engaged in the rebellion against the United States. Babcock having been killed, Coolidge, in 1868, brought suit in the Circuit Court, S. D. Ohio, to recover from Guthrie the value of the cotton seized and sold by General Curtis as above outlined.

THE POINTS OF LAW TO BE DECIDED

1. As to the jurisdiction of the Court in this case.
2. As to title to the captured property and rights of the plaintiff, if any, with respect thereto.

OPINION OF THE COURT

The first point, being of minor interest, may be dismissed with the statement that it was held that the Court had no jurisdiction over the subject matter of the case and that no action could be maintained in such court against the captor of booty. The learned Justice says:

“According to English law, which in this respect is in accordance with the principles of general law and public jurisprudence, no action can be maintained in a court of municipal law against the captor of booty or prize.”

As to the second point we note that the Civil war had been recognized as a public war with a foreign power. Arkansas was enemy territory and all property, therein enemy property. Cotton was an article of foreign and domestic commerce and one of the main sinews of power of the States in the rebellion the proceeds from its sale being largely used in the prosecution of the war. As to the right of taking property from an enemy Vattel says:

“We have a right to deprive our enemy of his possessions of every kind which may augment his power and enable him to make war.” Whenever we have an opportunity we seize on the enemy’s property and convert it to our own use; and thus, besides diminishing the enemy’s power, we augment our own, and obtain at least a partial indemnification or equivalent, either for what constitutes the subject of the war, or for the expenses and losses incurred in its prosecution. In a word we do ourselves justice.” * * *
“all movable property taken from him (the enemy) comes under the denomination of booty. This booty

naturally belongs to the sovereign prosecuting the war," * * * His soldiers, and even his auxiliaries, are only instruments which he employs in asserting his right. He maintains and pays them. Whatever they do is in his name and for him." Vat. Law Nat. pp. 364, 365, bk. 3, c. 9.

"The title to property lawfully taken in war may, upon general principles, be considered as immediately divested from the original owner, and transferred to the captor." * * * "As to personal property, or moveables, the title is in general considered as lost to the former proprietors as soon as the enemy has acquired a firm possession, which, as a general rule, is considered as taking place after the lapse of twenty-four hours, or after the booty has been carried to a place of safety *infra præsidia* of the captor. "Law. Wheat. 629.

"If the hostile power has an interest in the property, which is available to him for the purposes of war, that fact makes it *prima facie* subject for capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea, for it is a subject of taxation, contribution, and confiscation." Dana, Wheat. par. 256, N. 171.

It appears, therefore, that the right to lawfully capture enemy property in time of war is undoubted; that the title to such property rests with the sovereign power conducting the war and that the only recourse had by the owner of property so taken is that of an appeal to the government under whose authority the capture was made.

"Judgment must be for the defendant, with costs."

Cases Cited

No American cases cited; certain authorities have already been noted and in addition are the following:
3 Phil. Int. Law, p. 192, par. 130.

1 Kent Comm. (Last Ed.) 120.
Law, Wheat. 629.

NOTE

1. In *Dow vs. Johnson*, 100 U. S. 158 (1879), which was an action for the recovery of the value of certain property belonging to the plaintiff, a citizen and resident of Louisiana, seized in 1862 during the Civil War by Brigadier General Neal Dow, of the United States forces, commanding at Fort St. Philip below New Orleans, the plaintiff first instituted suit in the Sixth District Court for the City and Parish of New Orleans, a tribunal which had been allowed to continue in the performance of its functions after the occupation of New Orleans by the troops of the United States, and, under a clause in General Butler's proclamation, permitted to take cognizance of civil causes between parties. General Dow, although served with citations to appear, made no appearance or response, and was therefore defaulted. In this case the Supreme Court of the United States held in effect that the municipal court mentioned had no authority to adjudge the propriety or necessity of the exercise of the belligerent right of seizure and was without jurisdiction to hear the case.

United States vs. Padelford

United States Supreme Court, December, 1869, 9 Wall. 531

Statement of the Case

Appeal from the Court of Claims. That Court had found the facts to be as follows:

Edward Padelford, a banker of Savannah, Georgia, was the half owner of certain cotton stored in that city when captured and occupied by General Sherman's army December 21, 1864. Some time later this cotton was seized by the military authorities and turned over to the proper United States Treasury agents by whom it was transported to New York and sold, the money being deposited in the United States Treasury. This course was pursuant to the act of March 12, 1863, generally known as the Captured and Abandoned Property Act, one of whose clauses reads as follows:

"Any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said Court (1) of his ownership of said property, (2) of his right to the proceeds thereof, and (3) that he has never given *any* aid or comfort to the present rebellion, receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

Padelford brought suit in the Court of Claims for his share of the proceeds from the sale of this

cotton and secured judgment in his favor, amounting to \$123,138. The United States appealed the case to the Supreme Court.

It was found in the previous hearing in the Court of Claims that Padelford in his individual capacity, also the Marine Bank of Savannah, of which he was one of the largest stockholders and most influential directors, had subscribed to the Confederate war loan. Such subscriptions, however, were the smallest practicable under the conditions, and were not made until public threats and clamor made such a course advisable as a means of safety to the bank. It also appeared that Padelford had executed, as surety, a bond for the faithful performance of duty by certain quartermaster and commissary officers in the Confederate army. This latter action was dictated by motives of personal friendship and was entirely voluntary.

On December 8, 1863, President Lincoln issued his proclamation of amnesty as authorized by the act of July 17, 1862. By the terms of this proclamation, persons, with certain specified exceptions, who had participated or aided in the rebellion, upon subscribing a certain oath, would be granted full pardon and amnesty, and would be restored to all property rights except as to slaves. Padelford, who was not within any of the exceptions, subscribed this oath January 18th, 1865, subsequent to the capture of Savannah but prior to the actual seizure of his cotton. After Padelford had filed his claim in the Court of Claims, Congress by its act of June 25, 1868, enacted:

“that whenever it shall be material in any suit or claim before any court to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant or party asserting the loyalty of such party to the United States, during such rebellion, shall be required to *prove affirmatively* that

person did, during said rebellion, constantly adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion.”

The Court of Claims found that there was nothing in Padelford's conduct to constitute giving aid or comfort to persons in rebellion within the provisions of the acts of March 12th, 1863 and June 25th, 1868, and that if it had, he was entitled to recover, having taken the oath and been loyal afterwards.

It was contended by the government:

1. Referring to Padelford's subscription to the Confederate war loan, that the force, coercion or fear sufficient to excuse an unlawful act must follow from fear of an immediate and actual danger threatening the very life of the party. (U. S. vs. Vigol, 2 Dallas, 346; U. S. vs. Haskell, 4 Washington's Circuit Court, 402, 406.)

2. That his action in executing as surety, bonds of Confederate army officers cannot be excused on the grounds alleged (friendship and the claim that these officers were thus saved from active operations in the field.)

3. That should any of the above acts be construed as giving aid or comfort to the rebellion, taking the amnesty oath by Padelford would not make him competent to sue in the Court of Claims for the reason that the act of January 25th, 1868, distinctly required any claimant under the Abandoned and Captured Property act to show affirmatively that he had never afforded such aid or comfort.

THE POINTS OF LAW TO BE DECIDED

1. Was the action of Padelford in subscribing to the Confederate war loan, either in his individual capacity or as a director in the Marine Bank, to be construed as giving aid or comfort to the rebellion.

2. Was his action in executing a bond, as surety,

for the faithful performance of duty by Certain Confederate army officers giving such aid or comfort.

3. In the event that any of the actions mentioned should be so construed, was Padelford's subscription to the amnesty oath prescribed in President Lincoln's proclamation sufficient to restore to him the right to sue under the Captured and Abandoned Property Act.

4. Did the act of June 25th, 1868, make it incumbent upon him to show affirmatively that he had never given aid or comfort to the rebellion, notwithstanding his action in subscribing the amnesty oath.

5. Does the seizure of private property in a captured place date back to the capture of the place in which it is located or only to such time as it is actually reduced to possession by some act of the captor.

OPINION OF THE COURT

The Opinion, delivered by the Chief Justice is prefaced by the statement that the Captured and Abandoned Property Act was to be construed liberally. The beneficent intention of Congress was that all captured or abandoned property was to be sold and the proceeds deposited in the United States Treasury, subject to the right of any lawful owner to claim such proceeds upon proof that he had never given any aid or comfort to the rebellion.

Concerning the first question, Padelford's subscription to the Confederate war loan the court said:

"Among these findings (of the Court of Claims) is one that the 'petitioner never gave any voluntary aid or comfort to the late rebellion,' * * * unless certain facts, also found, constitute in law such aid or comfort. On the part of the government it is objected to this finding that it is insufficient, because the statute authorizes relief only on proof that no aid or comfort was given. But we think otherwise.

It would violate the soundest maxims of interpretation if we were to construe the act so as to deprive claimants of the benefits intended to be given by it because of aid and comfort to the rebellion not voluntarily given."

Concerning the second question (the bonding of Confederate officers) the court said:

"But the court also finds that the petitioner executed as surety three official bonds, two of commissaries and one of a quartermaster in the military service of the so-called Confederate States, from motives of personal friendship to the principals. No compulsion is alleged. On the contrary, these acts are found to have been voluntary. We cannot doubt that these facts did constitute aid and comfort to the rebellion within the meaning of the act. The finding of the court, qualified as it was, is a virtual finding that the petitioner did give such aid and comfort. The general facts found of opposition to the rebellion, so far as opposition would be tolerated, and of earnest good will to the National cause, establish, doubtless, a strong claim upon the favorable consideration of Congress; but do not warrant the courts in relaxing, by a forced interpretation, a rule which Congress has established for the guidance of the Court of Claims in passing upon claims to the proceeds of abandoned or captured property."

With reference to the third question (amnesty) the court said:

"Now we have already seen that at the time when the petitioner took the prescribed oath no right of any third party had intervened; for even if it could be admitted that a right of the government derived from capture is an intervening right of a third person within the meaning of the proclamation, it is certain that no such right accrued to the government until actual seizure, which was after the pardon had taken full effect. In the case of Garland (4 Wallace, 380) this court held the effect of pardon to be such 'that in the eye of the law the offender is as innocent as if he had never committed the offense;'

and in the case of *Armstrong's Foundry* (6 Wallace, 769) we held that the general pardon granted to him relieved him from a penalty which he had incurred to the United States. It follows that at the time of the seizure of the petitioner's property he was purged of whatever offense against the laws of the United States he had committed by the acts mentioned in the findings, and relieved of any penalty which he might have incurred. We cannot doubt that the petitioner's right to the property at the time of the seizure, was perfect, and that it remains perfect, notwithstanding the seizure."

Concerning the fourth question (necessity, under act of June 25th, 1868, of showing affirmatively that the petitioner never gave aid or comfort) the court said:

"The suggestion is ingenious, but we do not think it sound. The sufficient answer to it is that after the pardon no offense connected with the rebellion can be imputed to him. If, in other respects, the petitioner made the proof which under the act, entitled him to a decree for the proceeds of his property, the law makes the proof of a pardon a complete substitute for proof that he gave no aid or comfort to the rebellion. A different construction would, as it seems to us, defeat the manifest intent of the proclamation and the act of Congress which authorized it."

The last question (as to what is to be considered the date upon which property is captured) is of particular importance to the military officer. The Court, after adopting a definition contained in a circular letter from the Treasury Department which defined such property as that "which had been seized or taken from hostile possession by the military and naval forces of the United States", and quoting from the case of *Mrs. Alexander's cotton* (2 Wallace, 404), said:

"But the case contains no intimation that such property can be considered as captured before actual

seizure. The rule, we think, is otherwise. Rights of possession of private property are not disturbed by the capture of a district of country, or of a city or town, until the captor signifies by some declaration or act, and generally by actual seizure, his determination to regard a particular description of property as not entitled to the immunity usually conceded in conformity with the humane maxims of public law.

“Rights of possession in public property belonging to the hostile organization, or used in actual hostilities, depend upon different principles. Such rights are transferred at once to the captor, upon the capture of the place where the property may be.”

The judgment of the Court of Claims was affirmed.

NOTES

1. *United States vs. Anderson*, 9 Wallace 56 (1869). Nelson Anderson, a free person of color, residing in Charleston, S. C., purchased cotton during the early part of the Civil War from one Fleming and, in 1864, more cotton from one Doucen. Both of the sellers were residents of the insurrectionary territory, and their loyalty, unlike that of Anderson, was not proven. On the 5th of May, 1865, Anderson reported his cotton to the United States military authorities, by whom it was taken over, shipped to New York, sold and the proceeds deposited in the Treasury. On June 5, 1868, Anderson entered a claim before the Court of Claims of the United States for the proceeds under the Act of March 12, 1863, which provided that any person proving loyalty and ownership and entering his claim within two years after the close of the rebellion should be paid the residue of such proceeds.

In construing the Act of March 12, 1863, the Supreme Court of the United States say:

During the progress of the war it was expected that our forces in the field would capture property, and, as the enemy retreated, that property would remain in the country without apparent ownership, which should be collected and disposed of. In this

condition of things, Congress acted. While providing for the disposition of this captured and abandoned property, Congress recognized the status of the loyal Southern people and distinguished between the property owned by them and the property of the disloyal. By the Act in question the government yielded its right to seize and condemn the property which it took in the enemy's country if it belonged to a faithful citizen, and substantially said to him, "We are obliged to take the property of friend and foe alike which we will sell and deposit the proceeds of in the Treasury; and if at any time within two years after the close of the rebellion you prove satisfactorily that of this property you owned a part we will pay you the net amount received from its sale."

No distinction was to be made between property, such as cotton and rice, raised by the loyal owners themselves and that purchased by them from others, i.e., it was not required that the title be traced to a loyal source.

The government claimed also that the persons from whom the claimant bought were, under the Act of July 17, 1862, prohibited from selling and that therefore the title of the claimant must fail. As to this the Court say: This is an attempt to import from the confiscation law of July 11, 1862, into this law, the Act of March 12, 1863, a disability which it does not contain. If this could be done, but very little benefit would accrue to the loyal people of the South from the privilege conferred upon them by the law in question. The two acts cannot be construed *in pari materia*. The one is penal, the other remedial; the one claims a right, the other concedes a privilege.

As to the government's contention that the two years allowed by law for the entering of the claim had expired, the Court found that in a domestic war some proclamation or legislation would seem to be required to inform those whose private rights were affected by it of the time it terminated and was of the opinion that Congress intended the limitation of the Act to begin to run only upon the happening of some such an event. The first proclamation of the President announcing that the insurrection was en-

tirely at an end throughout the country was dated August 20, 1866. The claimant had therefore put in his claim within the required limit of time.

2. United States vs. Klein, administrator of Victor F. Wilson, deceased, 13 Wallace 128 (1872). Treasury agents, in 1863, took possession of Wilson's cotton and sold the same, paying the net proceeds into the Treasury. Wilson, in 1862 and 1863, signed as surety two official bonds for disbursing officers of the Confederate army. February 15, 1864, he took the amnesty oath under President Lincoln's proclamation of pardon to all who had participated in the rebellion, dated December 8, 1863. Suit was brought in the Court of Claims for the proceeds of the cotton in 1866. In U. S. vs. Padelford the Supreme Court of the United States had already decided that going as surety on the bond of a Confederate army officer was giving such aid and comfort as to deprive the person of the benefits of the Act of March 12, 1863, but that the taking of and adhering to the amnesty oath restored those benefits, the same carrying full pardon.

On June 30, 1871, Congress passed an amendment to the appropriation bill which provided that whenever any pardon shall have heretofore been granted by the President to any person bringing suit in the Court of Claims under the Act of March 12, 1863, and such pardon shall contain the allegation that such person took part in the late rebellion against the United States or was guilty of any act of disloyalty against the government thereof; and such pardon shall have been accepted in writing by the person to whom issued without a protest against and without disclaiming the fact of disloyalty, such fact of acceptance shall be taken in the Court of Claims and on appeal as conclusive evidence that such person did take part in the rebellion and did give aid and comfort to the enemy; and on proof of such pardon, which proof may be heard summarily, the jurisdiction of the Court shall cease and it shall dismiss the claim.

In deciding this case, the Supreme Court of the United States decided that the seizure, sale and payment of the proceeds of captured and abandoned

property did not divest title to these proceeds out of the original owners because the Act of March 12, 1863, constituted the Government the trustee of such proceeds for such persons as were declared by the act itself to be entitled to them and for those whom it should thereafter recognize as entitled thereto; that Congress had, by the proviso of 1871, usurped the functions of the judiciary by specifying and directing therein what particular construction it should give to certain prior enactments and the precise judgment it should render in particular and enumerated cases; that Congress had, by the same proviso, infringed upon the President's constitutional power to pardon. The proviso of 1871 was therefore unconstitutional and void.

3. *Young vs. United States*, 97 U. S. 39 (1877). This case was an appeal from the judgment of the Court of Claims against John Young, trustee in bankruptcy of Alexander Collie, in a suit arising under the Captured and Abandoned Property Act of 1863. Collie was a British subject, residing in London. In 1862-3-4, Collie equipped several blockade runners and entered into formal contracts with the Confederate Government to furnish arms and munitions of war in exchange for cotton. Collie also made several presents of field guns of improved types to that Government. His acts in general placed him squarely in the category of an aider and abettor of the rebellion. During the years mentioned Collie also purchased large quantities of cotton much of which was stored in Savannah and was captured at that place when the city was occupied by Federal troops in 1864. The proceeds of this cotton were in controversy in the present case.

The Supreme Court of the United States made the following ruling in the matter: Cotton owned by a British subject, although he never came to this country, was, if found during the rebellion within the Confederate territory, a legitimate subject of capture by the forces of the United States, and the title thereto was transferred to the Government as soon as the property was reduced to firm possession. Within two years after the rebellion closed, if he had given no aid or comfort thereto, he could, under the

Act of March 12, 1863, have maintained a suit in the Court of Claims, to recover the proceeds of his cotton so captured which had been paid into the Treasury. If he furnished munitions of war and supplies to the Confederate Government, or did any acts which would have made him liable to punishment for treason had he owed allegiance to the United States, he gave aid and comfort to the rebellion, within the meaning of that act, and was thereby excluded from the privileges which it confers. By giving such aid and comfort, he committed in a criminal sense no offense against the United States, and he was therefore not included in the pardon and amnesty granted by the proclamation of the President of December 25, 1868. The proceeds amounting to nearly a million dollars accrued to the United States.

Lamar, Executor, vs. Browne

Supreme Court of the United States, 1875, 92 U. S. 187

Statement of the Case

This was an action in trover, brought in the United States Circuit Court for the District of Massachusetts, to recover the value of certain cotton alleged to have been unlawfully received and disposed of by Browne, et al., as agents of the United States under the Captured and Abandoned Property Act (12 Stat. 820).

It appears that, under the orders of his commanding general, a Colonel Kimball, 12th Maine Infantry, commanding at Thomasville, Georgia, in June, 1865, took possession of certain military stores (Confederate) and certain cotton found at or near that place—the private property to be returned to the owners if they satisfied him (Kimball) of their ownership and loyalty to the United States under certain proclamations of amnesty. It does not appear that any such showing of ownership or loyalty was made, and Kimball, under later orders, in August, 1865, transferred this property, including the cotton, to A. G. Browne, an agent of the United States Treasury Department to be disposed of according to law (12 Stat. 820).

It further appeared that this cotton had been stored at various times during the previous two or three years by Lamar (the plaintiff) in his own name, but that it was owned in various quantities by Lamar, (who had participated in the rebellion), by a blockade-running company of which he was the president, and by the States of Georgia and North Carolina.

On this showing the Circuit Court ruled that the action as against the defendants could not be sustained. The case was then carried on appeal to the Supreme Court.

THE POINTS OF LAW TO BE DECIDED

1. Could there be "hostile possession" and, consequently, could the seizure of the cotton be a "capture", hostilities in Georgia having ceased?
2. Was the cotton a legitimate subject of capture and its seizure therefore justified?
3. May those who are aggrieved look to the agents of the government for redress, or must they proceed against the government in the prescribed tribunals?
4. Do these agents who, under competent orders, received and disposed of the cotton, occupy any different position than do the original captors?

OPINION OF THE COURT

With reference to the first point, the court quotes a previous decision:

Property is captured on land when seized or taken from hostile possession by the military forces under orders from a commanding officer. — U. S. vs. Padelford, 9 Wall. 540.

It then held that though there was no hostile force east of the Mississippi River, a state of war existed till 1866, the State of Georgia being held by a military force and actually governed by means of such occupation. As to the contention that property cannot be considered as "captured" unless taken immediately from the enemy, the court says:

From time to time during the war the military lines of the enemy were forced back; and, as they receded, the hostile territory was entered upon by the forces of the United States. It was thus taken

out of hostile possession. Whenever, therefore, during this military occupation, enemy property found on the recovered territory was seized by the military forces, in obedience to orders, it was taken from hostile possession within the meaning of that term as used in respect to captures. Property taken on a field of battle is not usually collected until after resistance has ceased; but it is none the less on that account captured property. The larger the field, the longer the time necessary to make the collection. By the battle, the enemy had been compelled to let go his possession; and the conquerer may proceed with the collection of all hostile property thus brought within his reach, so long as he holds the ground.

With regard to the second point considered, the court referred to previously decided cases in which it had been decided that cotton was a legitimate subject of capture, even though private property, and held that that question was no longer open to argument. In support of this stand it was set forth that it was of particular value to the enemy; that it was, in fact, the main support of the rebellion; and that where it could be gotten to a market and sold, it was so used.

In taking up the third point, the court briefly stated the two well known principles that, for purposes of capture, all property found in enemy territory was to be regarded as enemy property, no matter who might be the owner; and that in war, all residents of enemy country are enemies. This was the bald statement of the principles of international law governing such seizures, showing that in the absence of some mitigating statute there was no redress. The court also drew attention to the difference between a capture on land and one at sea; viz: that capture on land changes the ownership without further adjudication, and that in such a case the orders of the government are a full justification to its followers—and stated that it is the state that must answer for any violation of the settled usages of civilized

warfare. It is to mitigate the harshness that might attend the application of these principles of the laws of war that the Captured and Abandoned Property Act (12 Stat. 820) was enacted. It was also held that the United States had not, as late as September 27, 1865, abandoned its claim to this cotton. Therefore the cotton having been lawfully captured, its title vested in the United States, and the former owners had no further interest in its disposition. Their remedy, as stated in the law (12 Stat. 820), lay in a suit against the government in the Court of Claims, and not in an action against any agent of the government³ or otherwise.

In arriving at an answer to the fourth question, the Court discusses the responsibility of the military officers who first had possession of the cotton. In speaking of the captors and of the Treasury agents, it says:

All acted for the government, and, while acting within the scope of their powers, were protected by its authority. Those aggrieved must look to the government, and not to the agents, for their indemnity. The military forces act in the field according to the laws of war, and seize that which is apparently the subject of capture. They act upon appearances, not upon testimony. They occupy upon land the same position that naval forces do at sea. Their duty is to seize and hold, leaving it to the owners to make good their claim, as against the captor, in the appropriate tribunal established for that purpose.

The Court then, touching on the similarity of the situations of the original captor and the Treasury agents, decides that they are all agents of the government, and that the latter are no more liable to suit by the former owners than is the original captor. As to the former's freedom from liability, a little earlier in the opinion a number of English decisions

were cited with approval and as authorities, in which it is clearly set forth that an action will lie only against the government, and then only in the court specially provided for such cases (in this case the Court of Claims).

The decision of the lower Court was affirmed.

Cases Cited by the Court

U. S. vs. Anderson, 2 Wall. 404.

U. S. vs. Padelford, 9 Wall. 540.

The Protector, 12 Wall. 702.

Klein's Case, 13 Wall. 137.

Haycraft vs. U. S., 22 Wall. 81.

English Cases

Lindo vs. Rodney, reported as a note to Le Caux vs. Eden.

Elphinstone vs. Bedreechund, 1 Knapp, P. C. 316.

The Venice

Supreme Court of the United States, 1864, 2 Wallace 258

Statement of the Case

May 15, 1862, the schooner Venice was captured in Lake Ponchartrain, Louisiana, by the U. S. Ship Calhoun, was taken to Key West, libelled as a prize of war in the U. S. District Court, but was restored with her cargo to the claimant, Cooke, by its decree. The United States appealed.

Cooke was a British subject who had resided in New Orleans most of the time for ten years before the capture. April 6, 1862, Cooke bought 205 bales of cotton in Mississippi and had them taken to New Orleans. There he bought the Venice (April 9) and and also (about April 12) he bought twenty bales of cotton. All of the cotton was put aboard the Venice.

April 17th the Venice was towed to the head of Lake Ponchartrain, anchored and remained there until the capture.

During this time the States of Louisiana and Mississippi were entirely under rebel rule.

April 25th the United States fleet reached New Orleans, but did not take control of the city.

May 1. Major General Butler arrived with United States troops and occupied the city.

May 6, General Butler published a proclamation in the newspapers of the city. This proclamation declared, among other things:

"All rights of property of whatever kind will be held inviolate, subject to the laws of the United States."

Also: "All foreigners, not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States will be protected in their persons and property as heretofore under the laws of the United States."

August 16th, 1861, the President, by authority given him by Section 5, Act of Congress of July 13, 1861, declared certain States and sections of States to be in insurrection against the United States, except those parts maintaining a loyal adhesion to the Union and the Constitution or

"from time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents".

THE POINTS OF LAW TO BE DECIDED

1. Did the vessel and the cotton upon its transfer to Cook (a neutral) cease to be enemy's property?

2. Was New Orleans "occupied and controlled by forces of the United States engaged in the dispersion of the insurgents" on May 6th, when General Butler issued his proclamation?

3. Were the Venice and its cargo protected by the terms of General Butler's proclamation?

These questions were answered:

1. Negative.
2. Affirmative.
3. Affirmative.

Decree of the U. S. District Court affirmed.

OPINION OF THE COURT

* * * * *

The schooner Venice, with a cargo of two hundred and twenty-five bales of cotton, was captured in Lake Pontchartrain by the United States ship-of-war Calhoun, on the 15th of May, 1862; was taken to Key

West; was libelled as prize of war in the District Court; and was restored with her cargo, to the claimant, David G. Cooke, by its decree. The United States appealed. The claimant, Cooke, was a British subject, but had resided in New Orleans nearly all the time for ten years preceding the capture. * * * Early in April, 1862, he bought two hundred and five bales in Mississippi; and had them brought to New Orleans, where he purchased the Venice, on the 9th of April. Finding that the two hundred and five bales would not fully complete the lading of the schooner, Cooke bought twenty bales more about the 12th of April. The whole was put on board with as little delay as possible, and on the 17th of April, the schooner was towed out into Lake Pontchartrain, and taken to the head of the lake, where she was anchored, and remained, with only such change of position as was necessary to obtain a supply of water, until the capture. In the meantime the vessel was undergoing repairs.

While these transactions were in progress, the war was flagrant. The States of Louisiana and Mississippi were wholly under rebel dominion, and all the people of each state were enemies of the United States. The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the Government and of all the citizens or subjects of the other, applies equally to civil and to international wars. * * *

The vessel and the cotton at the time of purchase belonged to citizens either of Mississippi or Louisiana, and was therefore enemies' property.

Did the transfer to Cooke change the character in this respect of both or either?

Cooke was a British subject, but was identified with the people of Louisiana by long voluntary residence and by the relations of active business. Upon the breaking out of war, he might have left the State and withdrawn his means; but he did not think fit to do so. He remained more than a year, engaged in commercial transactions. Like many others, he seems to have thought that, as a neutral, he could share the business of the enemies of the nation, and

enjoy its profits, without incurring the responsibilities of an enemy. He was mistaken. He chose his relations, and must abide their results. The ship and cargo were as liable to seizure as prize in his ownership, as they would be in that of any citizen of Louisiana, residing in New Orleans, and not actively engaged in active hostilities against the Union. * * *

The fleet of the United States, under command of Flag-officer, now Vice-admiral, Farragut, reached New Orleans on the 25th of April, and the flag officer demanded the surrender of the city, and required the authorities to display the flag of the Union from the public buildings. The mayor refused to surrender and refused to raise the National Flag, but declared the city undefended and at the mercy of the victors. The flag-officer then directed the flag to be raised upon the Mint. It was raised accordingly, but was torn down on the same or the next day. The flag of the rebellion still floated over the hall where the city authorities transacted business. On the 29th, the Union flag was raised again, both on the Custom House and the Mint, and was not again disturbed. On the 30th, the flag-officer received from the mayor a note so offensive in its character, that all communication was broken off. The power of the United States to destroy the city was ample and at hand, but there was no surrender and no actual possession.

The transports conveying the troops under command of Major-General Butler, commanding the Department of the Gulf, arrived on the 1st of May, and the actual occupation of the city was begun. There was no armed resistance, but abundant manifestations of hostile spirit and temper both by the people and the authorities. The landing of the troops was completed on the 2d of May, and on the 6th a proclamation of General Butler, which had been prepared and dated on the 1st, was published in the newspapers of the city. * * * There was no hostile demonstration, and no disturbance afterwards; and we think that the military occupation of the city of New Orleans may be considered as substantially complete from the date of this publication; and that all of the rights and obligations resulting from such occupation, or from the terms of the proclamation,

may be properly regarded as existing from that time.

This proclamation declared the city to be under martial law, and announced the principles by which the commanding general would be guided in its administration. Two clauses only have any important relation to the case before us. One is in these words: "All the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States." The other is thus expressed: "All foreigners, not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States." These clauses only reiterated the rules established by the legislative and executive action of the national Government, in respect to the portions of the States in insurrection, occupied and controlled by the troops of the Union.

The fifth section of the act of July 13, 1861, * * * provided that, under certain conditions, the President, by proclamation, might declare the inhabitants of a State, or any section or part thereof, to be in a state of insurrection against the United States. In pursuance of this act, the President, on the 16th of August following, issued a proclamation declaring that the inhabitants of the States of Virginia, North Carolina, Tennessee, Arkansas, and the other States south of these, except the inhabitants of Virginia west of the Alleghanies, and of those parts of states maintaining a loyal adhesion to the Union and the Constitution, "or from time to time occupied and controlled by forces of the United States, engaged in the dispersion of the insurgents", were in a state of insurrection against the United States.

This legislative and executive action related, indeed, mainly to trade and intercourse between the inhabitants of insurgent parts of the country; but, by excepting districts occupied and controlled by national troops from the general prohibition of trade, it indicated the policy of the Government not to regard such districts as in actual insurrection, or their inhabitants as subject, in most respects, to treatment as enemies. Military occupation and control, to work

this exception, must be actual; that is to say, not illusory, not imperfect, not transient; but substantial, complete, and permanent. Being such, it draws after it the full measure of protection to persons and property consistent with a necessary subjection to military government. It does not, indeed, restore peace, or, in all respects, former relations; but it replaces rebel by national authority, and recognizes, to some extent, the conditions and the responsibilities of national citizenship.

The regulations of trade made under the act of 1861 were framed in accordance with this policy. As far as possible the people of such parts of the insurgent States as came under national occupation and control, were treated as if their relations to the national Government had never been interrupted.

The same policy may be inferred from the conduct of the war. Wherever the national troops have re-established order under martial rule, the rights of persons and of property have been, in general, respected and enforced. When Flag-officer Farragut, in his first letter to the rebel mayor of New Orleans, demanded the surrender of the city, and promised security to persons and property, he expressed the general policy of the Government. So, also, when Major General Butler published his proclamation and repeated the same assurance, and made a distinct pledge to neutrals, he made no declaration which was not fully warranted by that policy. There was no capitulation. Neither the assurance nor the pledge was given as condition of surrender. Both were the manifestation of a general purpose which seeks the re-establishment of the national authority, and the ultimate restoration of States and citizenship to their national relations, under better forms and firmer guarantism without any views of subjugation by conquest. * * * Vessels and their cargoes belonging to citizens of New Orleans, or neutrals residing there, and not affected by any attempts to run the blockade, or by an act of hostility against the United States after the publication of the proclamation, must be regarded as protected by its terms.

It results from this reasoning that the Venice and her cargo, though undoubtedly enemies' property at the time she was anchored in Lake Pontchartrain, cannot be regarded as remaining such after the 6th of May; for it is not asserted that any breach of blockade was ever thought of by the claimant, or that he was guilty of any actual hostility against the national Government. * * *

Decree affirmed.

Cases Cited

Prize Cases, 2 Black 666, 674.

Circassian, 2 Wallace 135.

NOTES

1. In the Prize Cases, 2 Black. 635 (1862), which was a proceeding for the condemnation of several merchant vessels which were seized by the blockading squadron at the beginning of the Civil War for attempting to break the blockade and also as being enemy vessels and containing enemy cargo, the Supreme Court of the United States held that whether property be liable to capture as enemies' property does not depend on the personal allegiance of the owner or whether he be an ally or a citizen; and that the produce of the soil of the hostile territory, and other property engaged in the commerce of the hostile power as the source of its wealth and strength, are legitimate prize without regard to the domicile of the owner.

2. The Venus, 8 Cranch 253 (1814). The Venus sailed from Liverpool on July 4, 1812, under a British license for the port of New York and was captured by an American privateer on August 6, 1812. At the time she sailed the owners did not know that war had been declared by the United States against England. The ownership of the cargo was found to rest in certain persons who were native British subjects. These men had previously, after a residence in the United States, become naturalized citizens thereof, but some time before the War of 1812 broke out, they had returned to England, settled there and engaged in trade. At the time the war broke out

they were still in England carrying on their commercial business. The Supreme Court of the United States held that the property of domiciled persons, equally with that of native subjects in their totality, is to be considered as goods of the nation, in regard to other States; that in time of war such property is subject to reprisals and also to capture by the enemy on the high seas; that the property of an American citizen, equally with that of a neutral, domiciled in a hostile country at the outbreak of war, is subject to capture on the high seas by the United States until such person puts himself in motion *bona fide* to quit the country in which domiciled.

3. The *William Bagaley*, 5 Wallace 377 (1866). The steamer "*William Bagaley*" sailed under the Confederate flag from Mobile on July 17, 1863, during the blockade declared by the Federal government on April 19, 1861. She was loaded with cotton, turpentine, etc. The vessel was promptly captured by the blockading squadron and libelled for condemnation. A claim for one-sixth the ship and cargo was interposed by Joshua Brandon, a loyal citizen of Indiana, residing therein, who based the claim on the fact that the owners of the vessel and cargo were Cox, Brainerd & Co., of Mobile, of which firm he was a member to the extent of one-sixth of all the property of the copartnership the title to which he had never transferred but of which he had been deprived in 1862 under a decree of condemnation of a Confederate court pursuant to a confiscation act of that government. The Supreme Court of the United States held that persons leaving personal property in hostile country and going to the other belligerent to which he owes his allegiance, must remove the property promptly or it will be liable as other hostile property, and the presumption is against it if it be allowed to remain; that war dissolves partnership between persons of hostile states and requires one to dispose of his interest if it is in a hostile country. If he does not do so, the property is liable as other hostile property.

4. *Mrs. Alexander's Cotton*, 2 Wallace 404 (1864), which was a case where cotton had been seized on a plantation on the Red River in Louisiana during an

advance by the Union troops up that river in 1864. The cotton had belonged to Mrs. Alexander who lived on the plantation at the time of the seizure. She claimed to be a loyal Union woman, but her loyalty was not conclusively proven. Fort De Russy, a Confederate work, was located near by and had been partly built by the labor of her teams and men. Confederate officers were frequent visitors at her home. She had taken the amnesty oath required by the President's proclamation of December 8, 1863, some three weeks after the capture of the cotton. The Supreme Court of the United States said, with respect to the property, that "there can be no doubt, we think, that it was enemy's property. The military occupation by the national military forces (the occupation lasted about six weeks) was too limited to effect a change. Fort De Russy was constructed in part by labor from the farm. It is said that Mrs. Alexander, though remaining in rebel territory, has no personal sympathy with the rebel cause, but this Court cannot inquire into the personal character and disposition of individual inhabitants of enemy territory. Being enemy property, the cotton was liable to capture and confiscation. It is true that this rule, as to property on land, has received important qualification from usage, from the reasonings of enlightened publicists and from judicial decisions. It may now be regarded as substantially restricted to special cases dictated by the necessary operations of war; and as excluding in general the seizure of the private property of pacific persons for the sake of gain. The commanding general may determine in what special cases its more stringent operation is required by military emergencies; while considerations of public policy and positive provisions of law and the general spirit of legislation must indicate the cases in which its application may be properly denied to the property of non-combatant enemies. In the case before us the capture seems to have been justified by the peculiar character of the property and by legislation. The rebels regard it as one of their main sinews of war; and no principle of equity or just policy required that it be spared from capture. Mrs. Alexander being now a resident in enemy territory, and in law an

enemy, can have no standing in any court of the United States, so long as that relation shall exist.

5. *Mitchell vs. United States*, 21 Wallace 350 (1874). At the beginning of the Civil War, Mitchell lived in Kentucky, a loyal state, and in July, 1861, went into the insurgent states on a pass issued by a military commander. He remained within the limits of the insurgent states until the latter part of 1864 when he returned to Kentucky. While within the limits of the Confederacy he bought a lot of cotton which was captured when the military forces of the United States occupied Savannah. Mitchell's claim was for the value of that cotton. His title depended upon whether his loyal domicile put him in the position of trading with the enemy, in violation of the laws of war, or not. It was held that he had been so trading. In this case the Supreme Court of the United States also held that contracts made by inhabitants of loyal States with the inhabitants of States in rebellion are illegal and void and confer no rights that can be recognized; that contracts between inhabitants of the insurgent States, not in aid of the rebellion, are as valid as those between the inhabitants of loyal States.

6: In *Thorington vs. Smith*, 8 Wallace 1 (1868), where in November, 1864, Thorington of Montgomery, Alabama, sold to Smith and Hartley, also of Montgomery, a piece of land near the city, during its occupation by the Confederate authorities, receiving in payment therefor Confederate notes for \$35,000 and a promissory note for 10,000 *dollars*, and entered suit in a United States Court in 1867 for the lien created by the note on the land, claiming the \$10,000 in United States money. The Supreme Court of the United States held that contracts stipulating for payment in the notes issued by the Confederate Government, and imposed by it upon the community by irresistible force, are transactions in the ordinary course of civil society and without blame, except when proved to have been entered upon with actual intent to further the insurrection, and should be enforced by the Courts of the United States to the extent of their just obligations.

7. In *Leitensdorfer vs. Webb*, 20 Howard 176 (1857), which was a proceeding in attachment to recover the amount due on a promissory note in New Mexico, the case being laid under a provision of the code adopted by the Military Governor during the military government of the country, the Supreme Court of the United States said that the military government mentioned was ordained to maintain the security of the inhabitants in their persons and property and that, while the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the government of their former allegiance or those arising under contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States or with any regulations which the conquering and occupying authority should ordain.

8. *Dean vs. Nelson*, 10 Wallace 158 (1869). In the year 1861, Thomas Dean was the owner of certain shares of stock in the Memphis Gas Light Company. These shares were transferred to one Nelson who in turn transferred part of them to his wife and part of them to one May. As security for payment Nelson gave a paper in the form of a mortgage, purporting to pledge so much of the real and personal property of the company as was represented by the shares in question. The paper contained the usual clause of defeasance and was duly recorded. Dean then withdrew to his home in Cincinnati. The Union forces occupied Memphis in June, 1862. On April 5, 1863, Nelson was ordered without the Union lines. May had remained without the Union lines. About the same time, the Federal commander organized a court or civil commission for the trial of civil suits. Before this court Dean, on September 1, 1863, filed a petition alleging the sale of the stock to Nelson, the non-payment of the note and the execution of the mortgage. The prayer asked for the sale of the stock and the foreclosure of the equity of redemption. Nelson, his wife and May were made defendants. They were returned "Not found" whereupon recourse was had to notice by publication in accordance

with the laws of Tennessee in force before the rebellion. No appearance having been effected, a decree was issued in Dean's favor. With reference to this proceeding by the civil commission the Supreme Court of the United States said: "The proceedings themselves were fatally defective. The defendants in the proceedings were within the Confederate lines and it was unlawful for them to cross those lines. A notice directed to them was mere idle form. They could not lawfully see or obey it. As to them the proceedings were wholly void and inoperative."

9. *Harmony vs. Mitchell*, Circuit Court, Southern District of New York, Federal Case 6,082 (1850) and *Mitchell vs. Harmony*, Supreme Court of the United States, 13 Howard 115, (1851). The facts were that Harmony, a naturalized American citizen, had been allowed to accompany Colonel Doniphan's command from Santa Fe in New Mexico to El Paso, during the Mexican war as a trader. At El Paso Colonel Doniphan, through the happening of unexpected events, concluded to push on to Chihuahua. Harmony desired to remain behind to sell his goods to the Mexicans with whom he was on friendly terms but permission was denied him mainly on the ground that his property and men were desired for the public service. Colonel Doniphan entrusted to Lieutenant-Colonel Mitchell the enforcement of the order for Harmony to continue with the command. There was a march of some length before the enemy was engaged. On arrival at Chihuahua, Colonel Doniphan advised Harmony to sell such of his goods as remained. He endeavored to dispose of them but the affair resulted in almost complete loss to him. It was held by the courts that if a trader with an army is allowed and encouraged to trade with that portion of the enemy under subjection, his goods cannot be seized on the ground of unlawful trading with the enemy; that nothing less than immediate and pressing danger during war will justify the seizure of private property to save it from the enemy; that an officer of the army is not a trespasser for seizing private property for public use only when there exists extreme necessity or present danger, a seizure for future expected or contemplated use rendering him a

trespasser and liable; that an officer becomes liable at the time of the taking if he is not justified in taking the goods and he is not relieved unless by waiver of the owner or by resumption of possession and ownership by the former owner; that to justify the execution of an order to seize property, the officer issuing the order must first be justified.

10. *Ford vs. Surget*, 97 U. S. 594 (1878). On March 6th, 1862, the Confederate Congress passed an act declaring it to be the duty of all military commanders in the Confederate service to destroy all cotton, tobacco, etc., whenever it was likely to fall into the hands of the Union forces. Pursuant to the act, General Beauregard, on May 2, 1862, issued a general order requiring all officers under his command to burn all cotton along the Mississippi likely to be secured by the Federals. One Alex. K. Farrar, was provost marshal of Adams County, Mississippi. On May 5th, 1862, Farrar, in compliance with the order mentioned, directed one Surget, a civilian, to burn 200 bales of cotton in said county, belonging to a man named Ford. This was accordingly done by Surget. In October, 1866, Ford brought a suit for the value of the cotton thus destroyed. The Supreme Court of the United States held that where the personal property of a voluntary resident citizen of one of the Confederate States was destroyed during the War of the Rebellion by either belligerent army, under proper orders as an act of war, a claim for damages by the owner will not lie; that where said property was destroyed by a citizen of the Confederate States acting under orders of the Confederate military authorities, no suit for damages will lie against said citizen.

11. *United States vs. Pacific Railroad*, 120 U. S. 127 (1886). This was a claim by the Pacific Railroad for the amount due it by the United States for the transportation of passengers and freight during the period from August 14, 1867 to July 22, 1872. The claim was offset by the Government which interposed a claim for a greater amount against the company by reason of the fact that the Government had constructed four bridges along its railroad during the

Civil War. A number of these railroad bridges had been destroyed, some by the Confederate forces, others by the Federals. All but these four had been rebuilt by the company. They had been reconstructed by the United States as a military necessity to enable the Federal forces to carry on operations and not by reason of any request of, or contract with, the railroad company. The Supreme Court of the United States held that private parties cannot be charged for works erected on their property by the government in pursuance of its military operations; that the Government is not liable for damages to, or destruction of, private property where the same are necessary to the conduct of the war or the safety or efficiency of its armies or where such damages or destruction result from the acts of the enemy; that private property taken or appropriated for public use in the service of its armies may be compensated for by the Government.

Rights Regarding Public Property

New Orleans vs. The Steamship Company

Supreme Court of the United States, 1874, 20 Wallace 387
Appeal from the Circuit Court for the District of Louisiana

Statement of the Case

The city of New Orleans was held by the Federal forces from May 1st, 1862 until March 18th, 1866, upon which latter date its government was transferred to the civil authorities. During this occupation military government obtained.

On July 8th, 1865, the mayor, pursuant to a resolution signed by the chairman of the Board of Street Landings and chairman of the Board of Finance, all of these functionaries having been duly appointed by the military government, executed to the New Orleans Steamship Company, a lease of certain waterfront property for a term of ten years. Under the provisions of this lease the lessees agreed to make certain extensive improvements which at the expiration of the lease were to become the property of the city. The annual rental was fixed at \$8,000, payable in monthly installments, and one such installment (\$666.67) was paid to and accepted by the civil city authorities April 11th, 1866, subsequent to the transfer of jurisdiction by the Federal forces.

One week later, i. e., April 18th, the city surveyor, acting under the orders of the city council approved by the mayor, destroyed the enclosure erected by the Steamship Company at a cost of \$7,000. The company then brought suit by a bill in equity praying for an injunction and damages. The

unpaid notes of the Steamship Company, which had been transferred to the civil authorities with the jurisdiction of the city, were deposited in court during this litigation.

During the progress of these proceedings the mayor applied to the Third District Court of the city and thereby obtained an injunction restraining the company from rebuilding the enclosure. The company thereupon served a rule upon the mayor requiring him to show cause why he should not be punished for contempt of court because of taking such action in another tribunal while the cause was pending.

At the final hearing of the case the city offered in evidence order No. 11 of Major General Canby, commanding the military department of Louisiana. This order was dated at New Orleans, February 9th, 1866, and was as follows:

"The several bureaus of the municipal government of the city of New Orleans, created by and acting under military authority, are enjoined and prohibited from alienating, or in any manner disposing of the real estate or other property belonging to the city, or granting any franchise or right to corporations or individuals for a term extending *beyond such period as the civil government of the city may be recognized and re-established under and in conformity to the Constitution and laws of the State*; and any alienation, disposition or grant will be subject to any rights and interest of the general government which may be involved, and shall not extend beyond the time when the questions relative to those rights and interests may be determined by competent authority."

The Court refused to receive this order in evidence and decreed that Clark, the mayor, should pay a fine of \$300 for the contempt of Court; that the city should be enjoined from interfering with the possession and enjoyment of the demised premises during the life of the lease, and that the company

should recover from the city \$8,000 damages. It was from this decree that the appeal was taken.

THE POINTS OF LAW TO BE DECIDED

1. Was the fine of \$300 for contempt error?
2. Was the refusal of the Court to admit General Canby's order No. 11 error?
3. Was the lease made by the military mayor of the city during the continuation of military government legal?

OPINION OF THE COURT

The opinion, delivered by Mr. Justice Swain, decided:

1. That the fine for contempt was proper and not in error. Concerning this the Court said:

"Contempt of Court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. In Crosby's case Mr. Justice Blackstone said: 'The sole adjudication for contempt, and the punishment thereof, belongs exclusively and without interfering to each particular court.' * * * It was unnecessary, unwarranted in law and grossly disrespectful to the Circuit Court to invoke the interposition of the State Court as to anything within the scope of the litigation already pending in the Federal Court."

Concerning the second question, General Canby's order No. 11, the Court said:

"The order of General Canby was issued seven months after the lease was made. The rights it conferred upon the lessees, whatever they were, had then become fully vested. * * * It does not appear that the government ever took any action touching this lease. The order could not, therefore, in any view, affect the rights of the parties. The Court did not err in refusing to receive it."

Concerning the last question (the legality of the lease) the Court said:

"It has been strenuously insisted that the lease was made by Kennedy without authority, was therefore void *ab initio*, and, if this were not so, that its efficacy, upon the principle of *jus post liminium* wholly ceased when the government of the city was surrendered by the military authorities of the United States to the mayor and common council elected under the city charter."

"Although the city of New Orleans was conquered and taken possession of in a civil war waged by the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate States, that government had the same power and rights in territory held by the conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war (The Prize Cases, 2 Black; Mrs. Alexander's cotton, 2 Wallace; Mauran vs. the Insurance Company, 6Id.) In such cases the conquering power has a right to displace the preëxisting authority, and to assume to such extent as it may deem proper the exercise by itself all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. * * * * * It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war.

In the case last cited the President had, by proclamation, established in New Orleans a Provisional Court for the State of Louisiana, and defined its jurisdiction. This court held the proclamation a rightful exercise of the power of the executive, the court valid, and its decrees binding upon the parties brought before it. In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace. It follows as a corollary from these propositions that the appointment of Kennedy as Mayor and of the Boards of Finance and of Street Landings was valid, and that they were clothed with the powers and duties which pertained to their respective positions.

It can hardly be doubted that to contract for the

use of a portion of the water-front of the city during the continuance of the military possession of the United States was within the scope of their authority. But, conceding this to be so, it is insisted that when the military jurisdiction terminated the lease fell with it. We cannot take this view of the subject. The question arises whether the instrument was a fair and reasonable exercise of the authority under which it was made.

When the military authorities retired the rent notes unpaid were all handed over to the city. The city took the place of the United States and succeeded to all their rights under the contract. (United States vs. McRae, 8 L. R. E. C., 75) The company became bound to the city in all respects as it had before been bound to the covenantees in the lease. The city thereafter collected one of the notes subsequently due, and it holds the fund, without an offer to return it, while conducting this litigation. It is also to be borne in mind that there has been no offer of adjustment touching the lasting and valuable improvements made by the company, nor is there any complaint that the company has failed in any particular to fulfil their contract.

We think the lease was a fair and reasonable exercise of the power vested in the military mayor and the two boards, and that the injunction awarded by the court below was properly decreed. The *jus post liminium* and the law of nuisance have no application in this case.

We do not intend to impugn the general principle that the contracts of the conqueror touching things in conquered territory lose their efficacy when his dominion ceases.

We decide the case on its own particular circumstances, which we think are sufficient to take it out of the rule.

We might, perhaps, well hold that the city is estopped from denying the validity of the lease by receiving payment of one of the notes, but we prefer to place our judgment on the ground before stated."

The judgment of the Circuit Court was affirmed.

Mr. Justice Hunt concurred only upon the ground mentioned in the last paragraph of the above quoted opinion. He held, however, that the law of *jus post liminium* did apply, the Confederate States, as far as the war was concerned, being considered in all particulars as a foreign foe.

Mr. Justice Fields submitted a dissenting opinion based upon the view that the power of the local officers under the military government was not sufficient to effect a lease extending beyond the continuance of the life of the military government itself.

NOTE

1. In *Texas vs. White*, 7 Wallace 700 (1868), which was an original bill before the Supreme Court of the United States to secure the return to the State of Texas of certain United States bonds, the property of that State, the same having been illegally disposed of during the Civil War by the insurrectionary government thereof, the Court held that public property of a State, alienated by an insurgent legislature in furtherance of a rebellion, may be reclaimed by the State when constitutional relations are restored.

Trade with Occupied Territory

The Sea Lion

Supreme Court of the United States, 1866, 5 Wallace 630
Appeal from the District Court for Southern Florida

Statement of the Case

The case was thus:

An act of Congress passed July 13th, 1861, prohibited all commercial intercourse between the inhabitants of any State which the President might declare in a state of insurrection, and the citizens of the rest of the United States; and enacted that all merchandise coming from such territory into other parts of the United States with the vessel conveying it should be forfeited.

The act provided, however, that "the President," might "in his discretion license and permit commercial intercourse" with any part of a State the inhabitants of which had been so declared in a state of insurrection," in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest." And that "such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

The President soon after declared several Southern States, and among them Alabama, in a state of insurrection, and the Secretary of the Treasury issued a series of commercial regulations on the subject of intercourse with them.

In 1863, Brott, Davis & Shons, a commercial firm

of New Orleans, obtained from Mr. G. S. Dennison, special agent of the Treasury Department, and acting collector of customs at New Orleans, a paper, as follows:

CUSTOM HOUSE, NEW ORLEANS,

Collector's Office, February 16th., 1863.

The United States military and other authorities at New Orleans permit cotton to be received here from beyond the United States military lines, and such cotton is exempt from seizure or confiscation. An order is in my hands from Major General Banks approving and directing this policy. The only condition imposed is that cotton or other produce must not be bought with specie.

All cotton or other produce brought hither from the Confederate lines by Brott, Davis & Shons will not be interfered with in any manner, and they can ship it direct to any foreign or domestic port.

GEORGE S. DENNISON,

*Special Agent of the Treasury Department,
and Acting Collector of Customs.*

APPROVED: D. G. FARRAGUT,
Rear Admiral.

In addition to indorsing his "approval" on this "permit," Rear Admiral Farragut, in command of the blockading force on that coast, also gave the following instructions to his commander of the Mobile blockade:

"Should any vessel come out of Mobile and deliver itself up as the property of a Union man desiring to go to New Orleans take possession and send it into New Orleans for an investigation of the facts, and if it be shown to be as represented, the vessel will be considered a legal trader, under the general order permitting all cotton and other produce to come to New Orleans."

With the first quoted of these documents in their possession, Brott, Davis & Shons addressed the following communication, dated March 9th, 1863, to the

firm of Oliver & Worne, who were engaged in business in New Orleans:

"All cotton and other produce shipped from within the Confederate lines to our address by yourself, as our agent, will be protected by us under authority from the military and naval authority of this place, dated February 16th, 1863, permitting us to receive such cargoes and to reship them to foreign ports. The original permit alluded to we herewith inclose to you."

On accepting from Brott, Davis & Shons, the agency, Oliver & Worne proceeded to Mobile, then occupied and held by the Confederate civil and military authorities, being, however, in a state of stringent blockade by the Federal navy.

At Mobile Oliver & Worne transferred their agency to Hohenstein & Co.

These persons, upon assuming the employment turned over to them, purchased a schooner, "The Sea Lion". This vessel was fitted out with the necessary crew, and loaded at Mobile with a cargo consisting of two hundred and seventy bales of cotton, and seven barrels of turpentine. The vessel, however, was not documented for New Orleans. The shipping articles, her clearance, bill of health, and manifest, all presented "Havana, Cuba," as the port of destination. She left Mobile on the 8th of May, 1863, under the Confederate flag. About 12 o'clock in the night of the 9th of May, and about four miles southeast from Fort Morgan, she was discovered and seized by the Federal blockading squadron, and sent to Key West, where in the District Court for Southern Florida, both vessel and cargo were condemned, as prize of war.

From this decree the owners of the vessel and cargo appealed to the Supreme Court of the United States; claimants seeking to reverse the decree upon

the grounds that both vessel and cargo were protected by a license, and that such license had been employed in good faith. In regard to this latter point it was contended by the appellants that documenting the vessel for Havana, Cuba, was a necessary subterfuge, in order to obtain her clearance by the Confederate authorities at Mobile, and to conceal from them the real destination, viz: New Orleans.

The Court, after reviewing the testimony in regard to this fact, in part, said:

“ * * * It is difficult to resist the conclusion that the vessel left Mobile, with alternative purposes; one, if possible to evade the blockading fleet and make Havana; the other, if intercepted and seized, to set up the license and insist upon the pretext, that she was proceeding, under its authority, in good faith to New Orleans. As we shall not place our judgment upon this ground, it is unnecessary further to pursue the subject.”

The averment that both vessel and cargo were protected by a license, upon which ground appellants mainly relied for the petitioned relief, rested for its determination upon the question of law:

Did the “permit” of the acting collector of customs at New Orleans, approved by the commanding officer of the Federal blockading force on that coast, together with the latter’s order to the commander of the Mobile blockade, privilege this vessel and cargo from capture?

The Court said:

“The effect of this paper depends upon the authority under which it was issued. The fifth section of the act of July 13th, 1861, authorized the President to proclaim any State or part of a State in a condition of insurrection, and it declared, that thereupon all commercial intercourse between that territory and the citizens of the rest of the United States, should cease and be unlawful, so long as the condition of

hostility should continue, and that all goods and merchandise coming from such territory, into other parts of the United States, and all proceeding to such territory by land or water, and the vessel or vehicle conveying them, or conveying persons to or from such territory, should be forfeited to the United States: 'Provided, however, That the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.'

"There is no other statutory provision bearing upon the subject, material to be considered.

"On the 16th day of August, 1861, the President issued his proclamation declaring the inhabitants of the rebel States, including Alabama, to be in a state of insurrection.

"On the 28th of the same month the Secretary of the Treasury, pursuant to the provisions of the act referred to, issued a series of regulations upon the subject of commercial intercourse with those States.

"These regulations continued in force until the 31st of March, 1863, when a new series were issued by the same authority. The former were in force when the alleged license bears date; the latter when the vessel and cargo left Mobile and when they were captured. It is unnecessary to analyze them. It is sufficient to remark, that they contain nothing which affords the slightest pretext for issuing such a paper. It is in conflict with the rules and requirements contained in both of them. It finds no warrant in the statute. The statute prescribes that the President shall license the trade. The only function of the Secretary was to establish the rules by which it should be regulated, when thus permitted. The order of General Banks is not produced. If it were as comprehensive as the special agent assumed it to

be, it covered shipments to New Orleans from Wilmington, Charleston, and all other points in the rebel States. It embraced merchandise, coming alike from places within, and places beyond his military lines. With respect to the latter it is clearly void. The President only could grant such a license. Mobile was then in possession of the enemy. The vessel and cargo bore the stamp of enemy property. The paper relied upon was a nullity, and gave them no protection. They were as much liable to capture and condemnation as any other vessel or cargo, leaving a blockaded port and coming within reach of a blockading vessel.

"The decree below was rightly rendered, and it is affirmed."

NOTES

1. The Ouachita Cotton, 6 Wallace 521 (1867). Simmons and Tatem had a plantation in Louisiana where they raised cotton. Simmons, who had become the sole owner of the cotton in controversy in this case, sold it to the Confederate government in 1862. The place where the cotton was raised and finally seized and from which it had never been removed until the time of seizure, was and always had been since the commencement of the war, insurgent territory.

Withenbury and Doyle, citizens of Ohio, were in Louisiana at the outbreak of the war, and remained there. They owned several steamboats which the Confederate government took from them, paying them in cotton of which that in question was a part. After the occupation these men secured permission from the military authorities at New Orleans to bring to New Orleans from Upper Louisiana a quantity of cotton. They intended to bring in this cotton, but before that could be done it was seized.

Le More & Company, a commercial house of Havre, France, claimed 830 bales of this same cotton. Their contention was that they had bought the cotton, through an agent, from one Queyrous, a naturalized citizen of the United States, residing in New Orleans, who, in turn, had bought it from Buckner, an agent of the Confederate government.

The Bank of the State of Louisiana found itself, at the occupation of the city of New Orleans by the Union forces, in the possession of a large amount of Confederate currency, then worthless. In order to still further depreciate the value of the Confederate currency in insurgent regions as well as to secure valuable products for the United States territory, the military commander permitted the bank to use this money in buying cotton along the Red and Ouachita Rivers. Part of the cotton bought was that in controversy. Later the bank sold some of the cotton to Gruff and Lunts, who interposed their claim to this cotton on these grounds.

The cotton was seized, taken to Cairo and libelled for condemnation.

The Supreme Court of the United States laid down the following principles in the case:

The fifth section of the act of July 13, 1861, authorized the President to declare States or parts of States where the rebellion then existed in a state of insurrection and directed that thereupon all commercial intercourse between the same and loyal States should cease except as the President might license and permit. On August 16, 1861, the President issued a proclamation pursuant to this act, but excepted from its prohibitions concerning trade such parts as might be occupied from time to time by the forces of the United States. On April 2, 1863, another proclamation was issued declaring the same States as before in insurrection, but revoked all the trade exceptions contained in the previous proclamation but those referring to certain ports of which New Orleans was one. The date of this last proclamation was prior to either of the purchases from Confederate agents. The occupation of New Orleans having been completed on the 6th of May, 1862, from that time on its citizens were clothed with the same rights of property and were subject to the same inhibitions and disabilities as to commercial intercourse with the territory declared to be in insurrection as the inhabitants of loyal States. Such is the result of the application of well settled principles of public law.

The alleged contract and transaction made by

Witherbury and Doyle in 1863 and 1864, the alleged transaction and contract in 1863 between the Louisiana State Bank and the rebel military authorities and the alleged transactions and contract in 1864 between the vendors of Le More & Company and the said authorities were each and both in contemplation of law null and void and vested no title or ownership to or in said cotton in them or any of them.

All the parties in this litigation stand before the Court without any right or interest in the cotton which can be recognized.

New Orleans, at the time of the alleged contracts was not, in the sense of the public or state law, in a state of hostility against the United States and therefore privy, voluntary and unlicensed business communications with enemies were absolutely interdicted as fundamentally inconsistent with the relations subsisting between the parties; and every contract attempted to be made in the course of such communication or intercourse must be treated as having no legal existence whatever and incapable of vesting any rights in the party asserting it enforceable in a court of justice.

The power to license commercial intercourse was confided by Congress exclusively to the President and it was usurpation of authority for any other officer, civil or military, to attempt the exercise of that power.

2. *McKee vs. United States*, 8 Wallace 163 (1868). The act of July 13, 1861, in addition to authorizing the President to declare what States and parts of States were in insurrection and prohibiting trade and other intercourse between the same and loyal States contained a proviso that he might nevertheless license and permit such intercourse as he might think most conducive to the public interest to be carried on in pursuance of regulations prescribed by the Secretary of the Treasury. The regulations prescribed by the Secretary absolutely prohibited all intercourse beyond the lines of military occupation by the United States forces. On July 17, 1862, Congress passed a confiscation act, directed especially at the property of those in the service of the Confederate government.

On March 4, 1863, John H. McKee, a loyal citizen

of the United States and a resident of New Orleans, which was at that time in the possession of the Federal government, purchased cotton from A. W. McKee, a resident of that portion of Louisiana then in rebellion and an agent of the Treasury Department of the Confederate government, being employed as such in the purchase and sale of cotton in Texas and part of Louisiana. The cotton remained where it was until seized by the Federal authorities, taken to Cairo, and libelled for forfeiture. McKee, the purchaser, claimed to have had the permission of the commanding officer of the Department of the Gulf to enter the Confederate lines and bring back any property he might purchase there; there was some evidence to show that he had in addition a license from the Treasury agents of the United States to trade therein.

The Supreme Court of the United States, having held in the Ouachita Cotton case that licenses granted by military authorities to trade with insurgents were void, applied the same principle here.

The regulations of the Treasury Department in existence on March 4, 1864, not only did not permit, but actually prohibited commercial intercourse with those regions in insurrection lying beyond the lines of the United States military forces; hence any permission that might have been granted by agents of the Treasury Department was wholly without authority.

The act of July 17, 1862, prohibited the sale of property by officers or agents of the Confederate government and all licenses to trade granted under the act of July 13, 1861, were necessarily affected by the provisions of that statute. Therefore, even had the claimant had the necessary authority to trade with enemy territory, such license could not have authorized trade with A. W. McKee, who held an important official position in the government of the Confederate States.

The Reform

Supreme Court of the United States, 1865, 3 Wallace 617

Statement of the Case

August 16th, 1861, President Lincoln in conformity with an act of Congress of July 13th, 1861, declared that among others the inhabitants of Virginia east of the Alleghany Mountains were in a state of insurrection against the United States and interdicted all commercial intercourse between them and loyal citizens until the insurrection ceased, unless by special permission and license of the President, through the Secretary of the Treasury, on pain of forfeiture of the goods and chattels, wares and merchandise sent to or from the prohibited regions, together with the vessel or vehicle conveying the same.

The introduction of cotton and tobacco raising into the loyal states was encouraged by Congress in an act of February 13, 1862, which appropriated \$3,000.00 for the purchase of cotton seed and \$1,000.00 for that of tobacco. It was provided that the purchases should be under the supervision of the Secretary of the Interior, and that the cotton seed should be purchased as far north as practicable.

Mr. William L. Hodge, of Washington City on March 7, 1862, obtained from the Secretary of the Treasury a license

“To employ a vessel to carry cotton seed from any point on the waters of Virginia emptying into the Chesapeake Bay to the port of Baltimore, provided that he, the said William L. Hodge shall first execute a bond, with one or more sureties, to be approved by the Solicitor of the Treasury, in the penal

sum of \$20,000.00, conditioned that the vessel so employed shall not transport to or from Baltimore or Virginia, any goods, wares, or merchandise, or supplies other than those actually required for the use of the crew thereof for one trip. * * * that one-half of the cotton seed so obtained shall be furnished to the Secretary of the Interior at the cost thereof."

Mr. Hodge did not make use of this license, but on the day following its issuance he procured the following letter:

DEPARTMENT OF THE INTERIOR,
March 8th, 1862.

Sir:

Congress having authorized this department to procure cotton seed for planting in the loyal States, I hereby authorize and appoint you to procure a cargo of the same in Virginia, and bring it to Baltimore, &c.

This letter will be your authority to procure said seed, and all parties in employ of the United States are respectfully requested to allow you to pass freely for said purpose.

I am, &c.,
C. B. SMITH,
Secretary.

W. L. HODGE, Esq.,
Washington City, D. C.
Indorsement

NAVY DEPARTMENT,
April 25, 1862.

Naval officers in command of ships of war will respect the inclosed, and will afford protection in waters under their control and jurisdiction inside the capes of Chesapeake Bay.

G. WELLS.

Under authority of and protection of this letter and its indorsement, a vessel called The Hunter made a trip to prohibited Virginia districts and brought back some tobacco seed. The schooner 'Reform' was then loaded with a miscellaneous cargo of value to a

blockaded region and cleared for Alexandria, a lawful port, but set sail for Urbanna, in the eastern section of Virginia which was then in insurrection.

The vessel was seized by revenue officers, brought back and libelled for forfeiture in the District Court for Maryland.

The District Court dismissed the libel, and on appeal this decree was confirmed by the Circuit Court.

The case was then taken for review on appeal to the Supreme Court by the United States.

THE POINTS OF LAW TO BE DECIDED

1. Was the act of July 13, 1861, making commercial intercourse unlawful between inhabitants of parts of the United States in insurrection, and those of the rest of the United States a temporary act, and were forfeitures under it capable of enforcement after the cessation of the insurrection?

2. Under the act of February 13, 1862, was the Secretary of the Interior empowered to authorize an agent to transport merchandise to territory in insurrection where seed could be procured?

3. Was the letter of the Secretary of the Interior indorsed by the Secretary of the Navy a license?

OPINION OF THE COURT

1. As to the first question:

This came up on motion of the respondents to dismiss the appeal, who claimed the act of July 13, 1861, was temporary and limited to the duration of hostilities and the war having terminated (December, 1865) the appeal should be dismissed.

The court held the act was not temporary and had never been repealed. The restrictions upon commercial intercourse were limited to the continuance of hostilities, but that did not limit the duration

of the act. The cessation of insurrection did not exonerate a vessel or cargo from forfeiture resulting from violation of the restrictions while in force.

2. As to the second question:

It seems that Hodge was not satisfied with the conditions set forth in the Treasury license procured by him March 7, 1862, and never attempted its use, but procured a letter from the Secretary of the Interior which he virtually construed as authorizing him to trade with prohibited districts. But this letter said nothing about taking cargo to Virginia or bringing back anything but cotton seed. There was no mention of the existing restrictions under the Act of July 13, 1861, and no statement that these had been in any way modified or repealed.

"Applying the usual rules of construction to the letter, the conclusion must be that it conferred no authority whatever upon the license to transport any merchandise to the port or place where the vessel was bound at the time of seizure."

The President and not the Secretary of the Interior had authority to permit such commercial intercourse.

3: As to the third question:

"Evidence of authority in William L. Hodge to embark in any such adventure being entirely wanting, it is unnecessary to examine the question whether the license, if valid and sufficiently comprehensive in its terms to protect the licensee, would afford any justification to the claimants."

"Decree of the Circuit Court is therefore reversed, and the cause remanded, with directions to enter a decree of forfeiture against both the vessel and cargo."

Cases Cited by the Court

The Venice, 2 Wallace 277.

United States vs. Walker, 24 Howard 311.

Wood vs. United States, 16 Peters 363.

United States vs. Lane

Supreme Court of the United States, 1868, 8 Wallace 185

Statement of the Case

The claimant, Lane, was a citizen of a state not in insurrection during the Civil War. He entered into a contract with one Risley, a U.S. treasury agent in Norfolk, Va., to deliver to the treasury agent a large quantity of cotton. This cotton was in the State of North Carolina on the Chowan River and within the lines of the insurrectionary forces. The military forces gave safe conduct to the claimant, his vessel, and crew to bring out the cotton. The ship when it left the U.S. lines had a license to take certain articles which were also protected en-route by the military.

A sub-agent representing the treasury agent at Norfolk was appointed to accompany the ship. He was in charge of the outward cargo and was directed to deliver the cargo on board to the claimant, Lane, when a quantity of cotton in value to three times the outward cargo had been placed on board. The ship arrived at the point where the cotton was, and the cotton was placed on board. It was received by the agent and the outward cargo turned over by him to Lane.

The vessel and cotton proceeded to return but were seized by the naval authorities in North Carolina and then released after some delay. Before arriving at her destination (Norfolk), she was again seized by the order of the admiral commanding the squadron in those waters.

The vessel was then sent to Washington, D.C.,

and libelled at the instance of the U.S. in the Supreme Court of the District of Columbia, sitting in admiralty, where however a decree with costs was awarded to the claimant.

No proceeding was ever made against the cotton and the same after some months delay came ultimately into the claimant's hands. He shipped the same to New York where it was sold but at a price much less than the price was before; and what he would have received had the voyage not been delayed.

The claimant then brought suit against the U.S. to make good the loss caused by the wrongful conduct of its naval officers.

The Court of Claims then ruled in favor of the claimant stating that the contract made with treasury agent was valid; that the seizure by the Navy was illegal; that the judgment of the Court of Admiralty was conclusive; and the voyage was a proper one and conducted in accordance with regulations. That such acts constituted a breach of contract between the claimant and the U.S. and entitled him to such damages as he had sustained.

The case was taken by appeal to the United States Supreme Court. In the appeal however no record of the suit in the Admiralty Court was produced.

One point on which the claimant hoped to keep the case from being decided by the Supreme Court was that he claimed that the judgment of the Court in Admiralty was conclusive and bound the U.S. from calling in the question of the legality and regularity of the voyage. However, no record was introduced to be set up as an estoppel.

POINTS TO BE DECIDED

1. Was the purchase of the cotton by the treasury agent in accordance with the existing regulations or was the manner of purchasing, trading within the military lines of the enemy?

2. Was it lawful to take out the cargo and give it protection and then turn over the same when cotton to three times the value had been placed on board?

3. Was the contract with the agent of the Treasury for the sale and delivery of the cotton lawful and valid?

4. Could the seizure and detention of the claimant's vessel and cargo, by officers of the navy, be any ground of claim for damages for breach of contract?

5. Can a record of judgment referred to in a finding act as an estoppel if the record is not introduced nor is it shown on what grounds the previous decision was based?

OPINION OF THE COURT

1. Upon the first question.

Early regulations by Congress on this subject were passed as follows:—

“By act of July 13, 1861, section 5, ‘all commercial intercourse’ by and between States declared in insurrection and the citizens thereof, and the citizens of the rest of the United States, was declared unlawful, except such as should be licensed by the President, and conducted under the regulations made by the Treasury Department.”

“An act of March 12, 1863, authorized agents of the Treasury Department to collect ‘all abandoned and captured property, &c.,’ and enacted that ‘all property coming’ into any of the United States not declared in insurrection ‘from within any of the United States declared in insurrection, through or

by any person other than a *treasury agent*, or under a lawful clearance by the proper treasury officer, shall be confiscated.' ”

On this point the Secretary of the Treasury enacted the following trade regulations:—

“The treasury regulations issued March 31st, 1863, by section 7, ordered thus: ‘No permit shall be granted to transport to or from, or to sell or purchase in any place or section whatever, not within the military lines of the United States Army.’ ”

“Regulation 8, as revised and published September 12th, 1863, declared: ‘Commercial intercourse with localities beyond the lines of military occupation by the United States forces is strictly prohibited, and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States.’ ”

As regards these regulations the court states:

“On the contrary the two foregoing regulations, expressly say that commercial intercourse with those parts of the insurrectionary States within the control of the rebels is absolutely forbidden. Has this policy since then been changed? It certainly has, if this proceeding was authorized; for if Risley in his capacity of treasury agent, could lawfully contract with Lane, a citizen of a State not in rebellion, to purchase from him cotton in the country of the public enemy, which he did not own or control, but must procure after he got there, and had the power to assist him in this enterprise, by allowing him to take out a cargo of goods to facilitate the purchase of the cotton, and to furnish for his protection a sub-agent and a military safe-conduct, then it is clear the door was left open for general trading with the enemy.”

2. Upon the second question:

“By the 4th Section of an act of July 2d, 1864, the prohibitions of the act of July 13th, 1861, were extended to commercial intercourse by and between persons residing or being within the lines of National military occupation, in such districts declared in in-

surrection, whether with each other or with persons being within such insurrectionary districts, but not within our military lines.”

“Section 8 of this act provided that the Secretary of the Treasury might authorize agents ‘to purchase for the United States any products of States declared in insurrection at such places therein as shall be designated by him, at such price as shall be agreed on with the seller, not exceeding the market price thereof at the place of delivery, nor exceeding three-fourths of the market value thereof in the city of New York, at the latest quotations known to the agent purchasing.’”

“Section 9 of this act repealed so much of section 5 of the act of July 13th, 1861, as made it lawful for the President to license or permit such trade by private citizens and traders except to supply necessities to loyal persons within the Federal lines, and to authorize persons within the Federal lines to bring or send to market in loyal States products of their own labor or of the labor of freedmen or others in their employment.

“If one citizen of a State, not in insurrection, could lawfully obtain from a treasury agent the right to transport goods to a place under the control of the insurgents, where he could exchange them for cotton or other products of the country, and could also have safe-conduct to take his property there, and to bring out the property he should buy, with the promise on the part of the agent to protect and purchase it, so could any citizen—for in this matter equality must be the rule—and in this way it is easy to see a free commercial intercourse with the enemy would be opened, and a radical change effected in the manner of conducting the war. Was this result contemplated by Congress in the act of July 2d, 1864?”

Reasoning from these regulations it is seen that it was deemed important to continue to maintain some commercial intercourse with the insurgents if it did not interfere with any military operations for

cotton especially was desired. In order to accomplish this intercourse and not have the embarrassment as would result from private trading, the manner of conducting the same, together with certain inducements held out to the confederates was to be left to the Treasury Department which prescribed the foregoing regulations.

As to the inducements for trading and the manner in which it was to be conducted the court adds:

"They were substantially told in the Regulations of the Treasury Department: 'If you will bring your your cotton within our lines, we will not only not seize it, but will buy it from you, and you are at liberty to go to the nearest treasury agent in an insurrectionary district to sell it, or if you prefer, you can leave it under the control of some one who can go to the agent and sell it for you.' If this were not enough to accomplish the object, the President of the United States, by way of further inducement, in an executive order of the same date with the Treasury Regulations, said to them: 'You can purchase such articles of merchandise as you need, not contraband of war, to one-third of the aggregate value of the products sold by you, and return with them, and I will guarantee you safe-conduct.' Why this limited permission to buy, after the delivery of the products, unless the privilege was for the benefit of the insurgents? If private persons, living in the loyal States, could engage in a venture like this of the claimant, they would need, as he did, to make the venture remunerative, to take with them a cargo of goods to exchange for Southern products; but there was no authority for this. The permission of the President is limited to the taking of a return cargo, bought with part of the proceeds of Southern products, previously sold and delivered to a purchasing agent of the Treasury Department."

3. Upon the 3d question.

"Enough has been said, without pursuing this investigation further, to show there is nothing in the act itself, the Regulations of the Treasury Department, or the order of the President, to justify Risley

in dealing in the manner he did, with Lane. It follows, therefore, that the voyage itself was illegal, as were the contracts and arrangements by which it was undertaken, and that the vessel and cargo were properly seized for being engaged in illegal trading with the enemy."

4. Upon the fourth question.

"In the view we take of this case it is unnecessary to discuss the question—conceding the contract to be lawful—whether the action of the naval authorities could be a ground of claim for damages for a breach of this contract against the United States, because, in our opinion, the contract was unauthorized, and had no power to bind the government."

5. Upon the fifth question.

"The Court of Claims find that no proceedings were taken against the cotton, and that it was restored to the claimant, but that the vessel was libelled at the instance of the United States, in the Supreme Court of the District of Columbia, where a decree, with costs, passed in favor of the claimant. It is argued, and was so ruled by the court below, that this decree concludes the United States. But the inquiry arises, how far the United States are concluded by it? The record of the admiralty court is not before us, and we only know from the record in this case, that that court refused to render a decree of forfeiture against the vessel, and awarded costs against the United States."

"There is nothing in this record to show that the Supreme Court of this District, in decreeing to the claimant the restoration of his vessel, adjudicated on the question of his right to damages. As that court had the power to award damages—and the record is silent on the subject—it is clear, either that the court refused damages, or that the claimant did not insist on the court considering the question."

"The United States are, therefore, not concluded on this point, and the case is relieved of all difficulty."

DECISION OF THE COURT

“The judgment of the Court of Claims is reversed, and this cause is remanded to that court, with directions to enter.

“An order dismissing the petition.”

Hall vs. Coppell

Supreme Court of the United States, 1868, 7 Wallace 542

Statement of the Case

Hall and Coppell, a British subject, were residents of New Orleans, La., during the Rebellion, Coppell being also the British consul at that place. During hostilities, Coppell contracted with Hall to protect, with a British consular certificate that it belonged to a British subject, certain cotton then in the rebel lines, bring it to New Orleans, then in the possession of the United States, and sell it. One of the features of the contract was that Coppell was to account to Hall for the cotton and pay to him two-thirds of the proceeds of its sale. By reason of the war it was found to be impracticable to bring the cotton to New Orleans until after the surrender of the Confederate forces in that section; and when that time came Hall refused to be bound by the terms of the contract, and proceeded to arrange for its sale without reference to Coppell.

When sued by Coppell on this breach of contract in the United States Circuit Court for the Eastern District of Louisiana, Hall pleaded the illegality of the contract, but also made a demand for reconvention.

The finding was for the plaintiff and Hall appealed the case to the Supreme Court.

THE POINTS OF LAW TO BE DECIDED

1. Did Hall's demand (in the lower Court) serve to cure any nullity or illegality in the contract, if

any existed, so that under the pleadings Coppell might recover, notwithstanding such illegality?

2. Did the orders of the commanding general of the United States forces in that region authorizing trade give validity to this contract?

3. Did the fact that both parties to the contract resided in New Orleans, then occupied by United States troops, make the contract valid under the law of nations?

OPINION OF THE COURT

In determining the first question the Court looked into the nature of the contract, whose terms were as stated above; but first it examined the consular certificates used. In doing this it was found that, though Coppell claimed to have contracted to buy the cotton, he had in fact not done so. He agreed to take charge of the cotton, transport it, sell it and protect it by use of his consular certificate, in consideration of which he was to retain one-third of the proceeds of its sale. Thus he was Hall's agent or factor, and the ownership remained vested in Hall. Hall, not being a British subject, the certificates were false. The Court held, however, that the certificates, even if issued in good faith, were nullities, as they were for the distinct purpose of defrauding the United States of its right, under the law of nations, to appropriate this enemy cotton. It also was made clear that the consular office does not in any way change the consul's status in his private business relations or before the courts in civil or criminal affairs.

The answer to this first question depends in a large measure upon those to the other two.

In determining under what terms trade might be carried on through hostile military lines, the Court first said:

“The war, in many of its aspects, was conducted as if it had been a public one with a foreign enemy. * * * When international wars exist, all commerce between the countries of the belligerents, unless permitted, is contrary to public policy, and all contracts growing out of such commerce are illegal. Such wars are regarded not as wars of the governments only, but of all the inhabitants of their respective countries. * * * The sanction of the sovereign is indispensable for trade. A state of war *ipso facto* forbids it. The government only can relax the rigor of the rule.”

Now, Congress had passed a law prohibiting this trade except as permitted by the President, but stipulated that when so permitted, certain regulations to be prescribed by the Secretary of the Treasury, must be complied with. This law made any other permission to trade with the enemy invalid and without authority; so any permit granted by the commanding general, Department of the Gulf, was of no effect, as such action was entirely beyond the sphere of his powers and duties. So it appeared that trading with the enemy was forbidden by both the law of nations and the municipal law.

Now to see what effect under the law of nations a common residence within the Union lines may have upon the validity of this contract.

It is shown that such a fact has no bearing on the matter. Mr. Justice Story (*The Rapid*, 8 Cranch, 155) is quoted as saying:

“That not only all trading, in its ordinary acceptance, but all communication and intercourse with the enemy were prohibited. That it was in no wise important whether the property engaged in the inimical communication be bought or sold, or merely transported and shipped. That the consummation of forfeiture was consummate the moment the property became the object of illegal intercourse.”

Kent, Ch. J. (*Griswold v. Waddington*, 16 Johns. 459 and 482) says:

“The payment of money by a subject of one of the belligerents, in the country of another, is condemned, and all contracts and securities looking to that end are illegal and void. * * *

The law has put the sting of disability into every kind of voluntary communication and contract with the enemy, which is made without the special permission of the government. There is wisdom and policy, patriotism and safety in this principle, and every relaxation of it tends to corrupt the allegiance of the subject, and to prolong the calamities of war.”

Other authorities, both American and British, are quoted and referred to, all going to show the absolute nullity of any contract made with an enemy, or for the purpose of trade in enemy property, no matter what might be the status of the contracting parties.

The court then reverted to the purposes of the contract, saying:

“The stipulations in the contract as to everything Coppel was to do in the rebel territory were contrary to public policy, to the law of nations, to Act of Congress, to the Proclamation of the President, and to the regulations of the Treasury Department.”

And again, with reference to similar contracts mentioned in several of the authorities quoted:

“Such contracts are not only illegal and void, but repugnant to every principle of public policy.”

The parties contracted to accomplish an unlawful act, and to that end executed an instrument which was therefore illegal and void as a contract. The defendant was as culpable as the plaintiff, but no act or neglect on his part could serve to put life into, and make effective, a contract that was, from its

very nature, unlawful and repugnant to every principle of public policy. The contract was to be considered void in the interest of the nation and the law, and no act or default by a party to it could, as said above, make it of any value. The law had forbidden such contracts, and therefore it could not be called upon to enforce them if made. As the court said in this connection:

“Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.”

The decision of the court was that the contract was void and not enforceable, and the judgment of the lower court was reversed, with directions to issue a *venire de novo*.

Cases Cited by the Court

- 93 U. S. 612.
- 101 U. S. 111.
- 103 U. S. 268.
- 17 Wall. 439.
- 21 Wall. 97, 352.
- 1 Dill. 381, 382, 576, 578.
- 7 Blatchf. 409.
- 15 Blatchf. 88.
- 2 Abb. U. S. 432.
- 1 Flipp. 311.
- 7 Am. Rep. 196 (32 Iowa 302).
- 13 Am. Rep. 739 (73 Pa. St. 201).

13 Am. Rep. 708 (72 Pa. St. 456).

37 N. J. L. 489.

20 Minn. 244.

56 Mo. 444.

Hamilton vs. Dillin

Supreme Court of the United States, 1874, 21 Wallace 73

Statement of the Case

Among others, one Hamilton, a citizen of Tennessee, obtained permits from Dillin, surveyor of the port at Nashville, Tennessee, during 1863 and 1864, to purchase and ship cotton to the loyal States, for which 4 cents a pound was paid. This payment was required by the regulations of the Treasury Department as a condition of carrying on this business between parts of the United States then in rebellion and occupied by Union troops with the loyal States.

Hamilton and others subsequently brought suit to recover, and the case was carried on error to the Circuit Court for the Middle District of Tennessee.

The law of the case was as follows:

The Constitution of the United States ordains:

“The Congress shall have the power to lay and collect taxes, duties, imports, and excises” (Art. I, Sec. 8) and “The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States, when called into actual service of the United States.” (Art. II, Sec. 8.)

July 13, 1861, Congress passed an act (Sec. 5, 12 Stat. at Large, 257) whereby the President was authorized to declare certain States in insurrection and prohibit all commercial relation with said States, giving him authority, however, to permit such commercial intercourse with parts of the rebellious States

or their inhabitants as he might think conducive to public interests, such intercourse to be conducted and licensed only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.

Accordingly, August 16, 1861, the President issued a proclamation prohibiting commercial intercourse between citizens of the insurrectionary and loyal States without special license and permission of the President, through the Secretary of the Treasury. The proclamation excepted from its operations parts of enumerated States that might adhere to the Union, and parts that might be occupied and controlled by forces of the United States. The exception was, however, by proclamation of April 2, 1863, abrogated except as to West Virginia and the ports of New Orleans, Key West, Port Royal or Beaufort in South Carolina.

February 28, 1862, the President authorized a partial restoration of commercial intercourse under rules and regulations prescribed by the Secretary of the Treasury.

In accordance therewith the Secretary of the Treasury at different times from February 28, 1862, to 11th of September, 1863, prescribed certain rules and regulations to be enforced by surveyors of the customs. The defendant, Dillin, was then surveyor of the port of Nashville. Certain fees for carrying on this trade were listed, one of the provisions being:

"For each permit to purchase cotton in any insurrectionary district, and to transport the same to a loyal State, * * * 4 cents."

Hamilton and others sued to recover the amount paid Dillin under this regulation.

The bill of exceptions indicates that on the trial there was no difference as to the facts of the case, it being admitted that the regulations were well known at Nashville; that seizures of cotton shipped without

authorized permits were made; that plaintiff made no formal protest at the time against the payment of the tax, but paid the same into the Treasury of the United States before the commencement of this action, and that Nashville was at this time within the lines of military occupation of the United States.

The plaintiff requested on the appeal that the Circuit Court charge:

“that the exaction of four cents per pound was illegal and void; that it was essentially a tax and not authorized by Congress; that even if authorized it was unconstitutional and therefore void and that the payment was involuntary and no protest was necessary to entitle to recovery.”

The court refused to charge as requested and the case was then carried to the Supreme Court of the United States where Mr. Justice Bradley delivered the opinion of the court.

THE POINTS OF LAW TO BE DECIDED

1. Was the payment of the four cents a pound a tax and therefore subject to the restrictions of Sec. 8, Art. I of the Constitution, or was it a payment, competent under the war power of the United States?
2. Was Nashville hostile territory in 1863 and 1864?

OPINION OF THE COURT

1. As to the first question:

“There can be no question that the condition requiring the payment of four cents per pound for a permit to purchase cotton in and transport it from the insurrectionary states during the late civil war, was competent to the war power of the United States government to impose. The war was a public one. The government in prosecuting it had at least all the rights which any belligerent power has when prosecuting a public war. That war itself was a suspension of commercial intercourse between the opposing

sections of the country. No cotton or other merchandise could be lawfully purchased in the insurrectionary states and transported to the loyal states without the consent of the government. If such a course of dealing were to be permitted at all, it would necessarily be upon such conditions as the government chose to prescribe. *The war power vested in the government implied all this without any specific mention of it in the Constitution.*

“Whether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is now unnecessary to decide, although it would seem that little doubt could be raised on that subject.

* * * * *

“The condition exacted by him (viz., Secretary of Treasury) was not properly a tax, but a bonus required as a condition precedent for engaging in the trade.”

As to the second question:

Under the Act of July 13th, 1861, the President had power to declare the inhabitants of a state or part of a state in insurrection. In accordance with this the President declared the State of Tennessee amongst others in insurrection, but by exception commercial intercourse was permitted with parts of the state remaining loyal and with parts occupied by United States troops. These exceptions, however, were abrogated by proclamation of April 2, 1863. The President had found the attempt to discriminate between the ports of the State impracticable and therefore, in 1863, declared the whole State in insurrection. He clearly had authority to do so especially as the insurrection was supported by state organizations and authorities. The “condition of hostility” remained until authoritatively removed by the proclamation of

the President at the close of the war. The court declares:

"We have frequently held that the civil war affected the status of the entire territory of the States declared to be in insurrection, except as modified by declaratory acts of Congress or proclamations of the President."

It was therefore evident that Nashville, although occupied by United States troops, was nevertheless hostile territory during 1863 and 1864.

In concluding the court declares:

"It is hardly necessary, under the view we have taken of the character of the regulation in question, and of the charge or bonus objected to by the plaintiffs, to discuss the question of the constitutionality of the act of July 13th, 1861, regarded as authorizing such regulations. As before stated, the power of the government to impose such conditions upon commercial intercourse with an enemy in time of war as it sees fit, is undoubted. It is a power which every other government in the world claims and exercises and which belongs to the government of the United States as incident to the power to declare war and to carry it on to successful termination. We regard the regulations in question as nothing more than the exercise of this power. It does not belong to the same category as the power to levy and collect taxes, duties and excises. It belongs to the war powers of the government, just as much as the power to levy military contributions, or to perform any other belligerent act."

List of Cases Cited

Cross vs. Harrison, 16 Howard 164, 190.
Leitsendorfer et al vs. Webb 20 Howard, 176.
The Grapeshot 9 Wallace 129.
The Venice, 2 Wallace 278,
Mrs. Alexander's Cotton, 2 Wallace 404.
Coppell vs. Hall, 7 Wallace 542.
McKee vs. United States, 8 Wallace 163.

List of Authorities Cited

Lord Stowell in "The Hoop, 1 Robinson 199."

Bynherhshock in "Questionum Juris Publici",
bk. 1 c. e.

1 Kent 432.

4 Wheaton 422; "Story on the Constitution."

Mitchell vs. United States

Supreme Court of the United States, 1874, 21 Wallace 350

Statement of the Case

Mitchell, the claimant in this case, brought suit in the Court of Claims to recover the value of 724 bales of cotton purchased by him within the Confederate States in November and December, 1864, which cotton was subsequently seized and sold according to law by the authorities of the United States and the proceeds deposited in the Treasury. The Court of Claims was equally divided in opinion as to whether Mitchell's claim could be sustained, and accordingly dismissed the petition. The case was then removed to the Supreme Court on appeal.

At the beginning of the Civil War Mitchell, the claimant and appellant, lived in Kentucky, a loyal State, and in July, 1861, went into the insurgent states on a pass issued by proper military authority of the United States. He remained within the limits of the Confederacy until the latter part of 1864, after the capture of Savannah by the United States, when he returned to Kentucky. While in the Confederate States Mitchell bought 724 bales of cotton, which he stored in Savannah. On the capture of that place by General Sherman the cotton was seized by the military authorities, sold by the agents of the government, and the proceeds, amounting to \$128,692.22, deposited in the Treasury.

THE POINTS OF LAW TO BE DECIDED

1. Right of an inhabitant of a loyal State to trade with the inhabitants of the States in rebellion, and the validity of contracts made between them.

2. Legality of contracts between the inhabitants of disloyal States.

3. A question of domicile of the claimant when he purchased the cotton.

OPINION OF THE COURT

Of the above questions, the third, being that upon which the case turned, was the only one dwelt upon at length by the court, the others being stated as matters of law applicable to the case under consideration. As to the first and second points above mentioned the court pointed out that at the time when Mitchell left Kentucky for the southern States, the war was flagrant and soon assumed the largest proportions. Important belligerent rights were conceded by the United States to the insurgents—soldiers captured being treated as prisoners of war, instead of being held for treason, etc., and the war conducted as if it were a public one with a foreign nation.

INTERCOURSE OF INHABITANTS OF LOYAL STATES WITH THOSE OF THE DISLOYAL STATES

The laws of war, as administered by the courts of justice, declare that all intercourse between inhabitants of the loyal and disloyal States is forbidden and that contracts between them are illegal and void and confer no rights which can be recognized.

CONTRACTS BETWEEN INHABITANTS OF INSURGENT STATES

“While such was the law as to dealings between the inhabitants of the respective territories, contracts between the inhabitants of the rebel States not in aid of the rebellion were as valid as those between themselves of the inhabitants of the loyal States.”

DOMICILE OF THE CLAIMANT WHEN COTTON
WAS PURCHASED

From the foregoing it is evident that the validity of the title acquired by the claimant to the cotton purchased by him in the insurgent States depended upon whether, at the time of purchase, he was domiciled in a loyal State or within the Confederacy.

Domicile has been defined as "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." A domicile once acquired, is presumed to continue until it is shown to have been changed, and the burden of proving such a change rests upon the party making the allegation. To change a domicile, "two things are indispensable; 1st, residence in the new locality; and 2d an intention to remain there. Either, without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change."

When Mitchell left Kentucky for the south his domicile, as clearly established by the evidence, was at Louisville. To this place he returned after Savannah was captured and his cotton seized. During his sojourn in the Confederacy all of the circumstances usually relied upon to establish an intention to remain were wanting.

"When the claimant left Louisville it would have been illegal to take up his abode in the territory whither he was going. Such a purpose is not to be presumed. The presumption is the other way. To be established, it must be proved."

CONCLUSION

"The rules of law, applied to the affirmative facts, without the aid of the negative considerations to which we have adverted, are conclusive against him. His purchase of the cotton involved the same

legal consequences as if it had been made by an agent whom he sent to make it.”

The judgment of the lower court was therefore affirmed.

Cases Cited

United States Supreme Court.
The Prize Cases, 2 Black 687.
Mrs. Alexander's Cotton, 2 Wallace 417.
Mauran vs. The Insurance Co., 6 Wallace 1.
Coppel vs. Hall, 7 Wallace 542.
U. S. vs. Grossmeyer, 9 Wallace 72.
Montgomery vs. U. S., 15 Wallace 400.
U. S. vs. Lapene, 17 Wallace 602.
Cutner vs. U. S., 17 Wallace 517.

Other Reports.

Griswold vs. Waddington, 16 Johnson 438.
Coolidge vs. Guthrie, 8 American Law Register, N. S. 20.
Guyer vs. Daniel, 1 Binney 349, note.
Somerville vs. Somerville, 5 Vesey 787.
Harvard College vs. Gore, 5 Pickering 370.
Crookenden vs. Fuller, 1 Swabey & Tristram, 441.
Hodgson vs. DeBuchesne, 12 Moore's Privy Council 288 (1858).

Matthews vs. McStea

Supreme Court of the United States, 1875, 91 U. S. 7

Statement of the Case

This case presents some interesting questions in connection with the subject of commercial intercourse between hostile states after the existence of a state of war has become a fact. The case arose as follows: On April 23, 1861, the firm of Brander Chambliss & Co., of New Orleans, La., of which firm Matthews, the defendant was an alleged member, accepted a bill of exchange payable one year from date to the order of McStea. Suit was brought by McStea in the Court of Common Pleas for the City and County of New York from which the case was carried to the Court of Appeals. The chief point of the defense, and the only one involving a Federal question, was that the co-partnership between Matthews, a resident of the State of New York, and the remaining members of the firm of Brander, Chambliss & Co., residents of Louisiana, (who were also defendants in the case though not served with process) had been dissolved by the war of the rebellion prior to date of acceptance of the bill. The case was decided against the defendant in the Court of Common Pleas and the judgment having been affirmed in the Court of Appeals the case was then carried by Matthews on a writ of error to the Supreme Court.

THE POINT OF LAW TO BE DECIDED AND OPINION OF THE COURT

Mr. Justice Strong who delivered the opinion of the court says:

“The single question which this record presents

for our consideration is, whether a partnership, where one member of the firm resided in New York and the others in Louisiana, was dissolved by the war of the rebellion prior to April 23, 1861."

The following points, among others, are brought out in the opinion of the court. The existence of a state of war prior to April 23, 1861, cannot be denied, *The Prize Cases*, 2 Black 635. One of the consequences of a declaration of war, or of the existence of a state of war where war has not been declared, is that all commercial intercourse and dealing between the contending states and their inhabitants is thereby rendered unlawful and that existing partnerships between residents of hostile states are dissolved. The reasons are obvious. A state of war renders all members of one belligerent power the enemies of all members of the other. Any commercial intercourse between the belligerents furnishes the means of conveying intelligence and may even open the way to traitorous correspondence.

"Hence it has become an established doctrine, that war puts an end to all commercial dealing between the citizens or subjects of the nations or powers at war, and 'places every individual of the respective governments, as well as the governments themselves in a state of hostility,' and it dissolves commercial partnerships existing between the subjects or citizens of the two contending parties prior to the war."

This interdiction of commercial intercourse resulting from a declaration of war between foreign powers applies also to a condition of civil war and especially where such war is sectional.

But while all this is true it is shown that the rule is not without its exceptions and that the mutual wants of nations must and frequently do prevail over the laws of war as to commerce with the result that trading with a public enemy may be authorized at

the will of that branch of the government to whom is intrusted the power of declaring war or even, to a limited extent, at the will of the military commander.

"It being, then, settled that a war may exist, and yet that trading with the enemy, or commercial intercourse, may be allowable, we are brought to enquire whether such intercourse was allowed between the loyal citizens of the United States and the citizens of Louisiana until the 23rd of April, 1861, when the acceptance was made upon which this suit was brought." * * * "No declaration of war was ever made. The President recognized its existence by proclaiming a blockade on the 19th of April; and it then became his duty as well as his right to direct how it should be carried on."

Prior to April 15, 1861, forts and property of the United States had been forcibly seized by hostile armed forces and yet the proclamation of the President of April 15, calling for the militia of the several States was not a distinct recognition that a state of war existed and the war was only inferentially recognized in the proclamation of April 19th prescribing the blockade. Furthermore these proclamations of the President clearly show that peaceable inhabitants of the insurgent states were not at this time to be regarded as enemies but that on the contrary they were to be protected in their life and property rights and their ordinary pursuits. The President had an undoubted right to allow such commercial intercourse as he saw fit between the inhabitants of the insurgent and the loyal States and the inference is clear that no interference in such intercourse except that resulting from the blockade was at this time intended.

"But in a civil more than in a foreign war, or a war declared, it is important that unequivocal notice should be given of the illegality of traffic or commercial intercourse; for, in a civil war, only the government can know when the insurrection has assumed the character of war."

If any doubt remained it should be set at rest by the Act of Congress of July 13, 1861, which provided that

“It may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof where such insurrection exists, are in a state of insurrection against the United States; and *thereupon* all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue.”

Under authority of this act the President did in fact issue a proclamation on August 16th, 1861, declaring commercial intercourse between the states designated as in insurrection and the inhabitants thereof, with certain exceptions, and the citizens of other States and other parts of the United States, to be unlawful. The implication both from the enactment and the subsequent proclamation is clear that up to the date of the proclamation of August 16, 1861, commercial intercourse between the loyal and the insurgent States was lawful and had been permitted.

“We think therefore the Court of Appeals was right in holding that the partnership of Brander, Chambliss & Co., had not been dissolved by the war when the acceptance upon which the plaintiff in error is sued was made.”

“The judgment is affirmed.”

The William Bagaley

Supreme Court of the United States, 1866, 5 Wallace 377

Statement of the Case

A steamer "William Bagaley", with a register issued in Mobile June 16, 1863, under the authority of the Confederate States and reciting a previous enrollment in 1857 and a present ownership, property,—having changed—, sailed under the Confederate flag from Mobile July 17, 1863 during the blockade declared by the United States on April 19, 1861.

She was loaded with cotton, turpentine, etc., and had no papers on board for fear of capture. The cotton was shipped for the benefit of the owners in Mobile. All the crew with one exception, were citizens of the Confederate States. The vessel was instructed to escape the blockading squadron but not to resist.

The vessel was captured by the blockading squadron and brought to New Orleans and libelled for condemnation, a claim for one-sixth the vessel and cargo was interposed by Joshua Bragdon.

The facts upon which Bragdon based his claim were that he, Bragdon, was a citizen of Indiana and had been residing there for years. That the firm of Cox, Brainerd and Co. of Mobile were the owners of the vessel and cargo and that the claimant had been a member of the firm for years and owned one-sixth interest in all the property of the copartnership and that he had never transferred it in any way. Further, that he had always been a true and loyal citizen of the U. S., had never aided or abetted the Rebellion, and that after the breaking out of the

same, had never exercised any act or ownership of control over the property or the capture of the steamer. That in consequence of his loyalty, the Confederate Government seized all his interest and property in the said firm of Cox, Brainerd & Co. and by a decree and process of one of the pretended Courts in 1862 had confiscated his property. That all such acts of the Confederate Government were void and that the title of the claimant remains unimpaired.

The facts further showed that the vessel had been properly condemned and sold and that the proceeds of the sale were duly paid to the Marshall to be deposited in the registry of the Court, but that before the funds were actually deposited, the appellant filed his petition claiming one-sixth the proceeds.

Exceptions were filed to the petition but were overruled by the Court, and the District Attorney admitted the facts as true. The parties were then heard on an agreed statement, and the District Court entered a decree that the intervention and claim of the petitioner be rejected and dismissed with costs.

Appeal was then taken to the Supreme Court upon the ground that the claimant as owner of one-sixth of the steamer and cargo is entitled to one-sixth the proceeds of the sale.

After the appeal was entered in the Supreme Court the other parties filed a petition asking to intervene for the other five-sixths of the vessel and cargo. They were never parties before, because they claimed at that time they were residents of a state hostile to the Union and so had no standing in the Courts. They allege however, that since then, they have severally received the pardon of the President for all pains and penalties incurred for breaches of blockade, and for all offenses committed in the rebellion; and on these grounds they asked that their portions of the proceeds of the sale be restored to them.

THE POINTS OF LAW TO BE DECIDED

1. If a person leaves personal property in a hostile country and leaves to return to the other belligerent, his proper allegiance, will the property be looked upon as hostile, unless an effort is made immediately to remove it, and will the presumption of law be for or against him if he allows it to remain?

2. Will the effect of war dissolve a partnership between citizens of hostile states if the person abandoning his property makes no attempt to dispose of it?

3. Is the character of a ship in time of war judged by the flag under which she sails?

4. If the cargo and ship are owned by the same party, does the cargo suffer the same fate as the ship?

5. Can parties in a prize proceeding who are neither appellants nor appellees, and who were not parties in the case in the Circuit Court, be heard in the supreme Court?

OPINION OF THE COURT

1. Upon the first question:

“Personal property, except such as is the produce of the hostile soil, follows as a general rule the rights of the proprietor; but if it is suffered to remain in the hostile country after war breaks out, it becomes impressed with the national character of the belligerent where it is situated. Promptitude is therefore justly required of citizens resident in the enemy country, or having personal property there, in changing their domicile, severing those business relations, or disposing of their effects, as a matter of duty to their own government, and as tending to weaken the enemy.

“Members of a commercial firm domiciled in the enemy country, whether citizens or neutrals, after having been guilty of such delay in disposing of their interests or in withdrawing their effects, cannot,

when the property so domiciled and so suffered to remain, is captured as prize of war, turn around and defeat the rights of the captors by proving that their own domicile was that of a friend, or that they had no connection with the illegal voyage."

"Property suffered so to remain has impressed upon it the character of enemy property, and may be condemned as such." * * *

The Court also rendered a decision as regards a person who remains for any length of time in the enemy's country. This was *obiter dicta* yet essential in military law."

"Presumption of the law of nations is against one who lingers in the enemy's country, and if he continue there for much length of time without satisfactory explanations he is liable to be considered as remorant, or guilty of culpable delay, and an enemy."

2. Upon the second question:

The proclamation of the blockade was made by the President in 1861, and, on July 13th, Congress authorized the President to interdict, by proclamation, all trade and intercourse between the insurrectionists and the United States. The act also provided that after fifteen days any ship or vessel belonging in part to any citizen or inhabitant of a State in insurrection, if found at sea or in a port of a loyal State, may be forfeited. This is recited to show that the people were notified and that the government acknowledged the existence of war.

"Open war had existed between the belligerents for more than two years before the capture in this case was made, and yet there is not the slightest evidence in the record that the appellant ever attempted or manifested any desire to withdraw his effects in the partnership or to dispose of his interest in the steamer. Effect of the war was to dissolve the partnership, and the history of that period furnishes plenary evidence that ample time was afforded

to every loyal citizen desiring to improve it, to withdraw all such effects and dispose of all such interests. 'Partnership with a foreigner,' says Machlachlan, 'is dissolved by the same event which makes him an alien enemy;' and Judge Story says 'that there is in such cases an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, and therefore that a dissolution must necessarily result therefrom, independent of the will or acts of the parties.'"

"Executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are *ipso facto* dissolved by the declaration of war, which operates to that end and for that purpose with a force equivalent to that of an act of Congress."

3. Upon the third question:

"Established rule is that when the owners agree to take the flag and pass of another country they are not permitted, as matter of convenience, in case of capture, to change the position they have voluntarily chosen, but others are allowed to allege and prove the real character of the vessel. Meaning of the rule is that the ship is bound by the character impressed upon her by the authority of the government from which all her documents issue. * * * Adopting that rule, Dr. Lushington held, in the case of *The Industrie* (33 Eng. Law and Eq. 572), that the share of a neutral in ownership, though purchased before the war, was subject to condemnation equally with the shares of enemies in the same ship. Principle of the decision is that whoever embarks his property in shares of a ship is in general bound by the character of the ship, whatever it may be, and that principle is as applicable to a citizen, after due notice and reasonable opportunity to dispose of his shares as to a neutral."

4. Upon the fourth question:

"Decision of Lord Stowell, in the case of *The Mercurius* (1 C. Robinson, 80), was that violation of blockade by the master affects the ship, but not the

cargo, unless it is the property of the same owner, or unless the owner of the cargo was cognizant of the intended violation.

“Proofs show that the cargo in this case was the property of the same owners, and, therefore, the case being within the principle of that decision, the cargo must follow the fate of the ship.

“Latest reported decision in that country is that of *Baltazzi vs. Ryder* (12 Moore’s Privy Council, 183), which was heard on appeal before the privy council, and the determination, both in the admiralty court and in the appellate court, was that where the cargo belonged to the same owners as the ship, the owners of the cargo as well as the ship were in general concluded by the illegal act of the master.”

5. Upon the fifth question:

“Original jurisdiction in prize, as well as in all other admiralty causes, is vested exclusively in the District Courts. Property captured, where appeals are allowed to the Circuit Court, follows the cause into that Court, but it does not in any case follow the cause into this Court, because this Court has no original jurisdiction in such cases.”

“Evidently the application in this case is in its nature original, and not appellate, and it is well settled that this Court has no original jurisdiction in prize causes.”

DECISION OF THE COURT

“Petition of intervention is dismissed, and the decree of the District Court affirmed.”

The decision of the Court was unanimous and was delivered by Mr. Justice Clifford.

Cases Cited by the Court

The Industrie, 33 Eng. Law and Eq. 572.

The Mercurius, 1 C. Robinson, 80.

Baltazzi vs. Ryder, 12 Moore’s Privy Council, 183.

Responsibility of Commanders, Military Government

Harmony vs. Mitchell

**Circuit Court, Southern District of New York, 1850, Federal
Case 6082**

Statement of the Case

This was an action of trespass, by Manual X. Harmony against David D. Mitchell, to recover the value of certain property taken by Mitchell, in the province of Chihuahua during the war with Mexico.

Before bringing this action, Harmony attempted to secure reimbursement through an act of Congress; but the bill for that purpose was referred to the Secretary of War, the Hon. William L. Marcy, for an opinion upon its merits and was returned with an adverse report. This left the civil courts as the only means of relief, and the case came before the Circuit Court, S. D. of New York, in the October term, 1850. Nelson, J., presiding.

The defenses set up were five:

1. That at time of seizure, Harmony was engaged in an unlawful trade with and affording aid to the public enemy.

2. That the seizure was to prevent the property from falling into the hands of the enemy.

3. That the property was taken for the public use and benefit.

4. That the plaintiff was estopped from claiming damages for the seizure because he had subsequent to the seizure, received back and assumed possession and ownership of the property from the military officers.

5. That the defendant only transmitted the order of a superior. Issue having been taken the trial was had before a jury whose province, as explained by the Court, was the determination of the facts, the court expounding and applying the law.

The case on the part of the plaintiff was this:

Harmony was a native of Spain, but a naturalized citizen of the United States residing in New York, and was engaged in an inland trade that was carried on between citizens of the United States and Mexico before the Mexican War.

This trade was authorized and favored by the United States.

Apprehension of hostilities, subsequent to the suspension of diplomatic intercourse between the United States and Mexico, after the annexation of Texas in 1845, had checked this trade. In December, 1845, diplomatic intercourse having been resumed and prospect of war having disappeared, Harmony proceeded to make preparations for a large expedition to start, early in spring of 1846, from Independence, Mo. The plaintiff arrived at Independence in April, 1846, and was there about a month fitting out the expedition.

Hostilities with Mexico broke out during this month, the existence of war being recognized by Congress and proclaimed by the President on the 13th of May, 1846.

About the 26th of May, and before the plaintiff had heard of the existence of war, he started on his expedition

“With a train of 14 large wagons, 12 oxen each, 2 traveling carriages drawn by mules, and 26 men, cost of goods \$40,000, wagons and outfit about \$10,000, the expenses of transportation was generally computed as equal to first cost.”

An officer of United States Dragoons from a gar-

.. rison a few hours ride from Independence (Fort Leavenworth) who passed the plaintiff just after the latter had started, knew nothing of any war. The officers of the garrison knew of his preparations to go on the expedition, but nothing of the war.

• About ten days afterwards, the plaintiff was overtaken by another officer with dragoons, who notified him of the war, and ordered him to follow on in his rear. After having waited a month for mounted troops under General Kearney to precede him, he was given permission to follow, and, with other traders, entered Santa Fe about the 25th of August. General Kearney acted as and was recognized as governor of New Mexico, it being under subjection to him. He gave the plaintiff permission to trade in New Mexico, charging \$4.00 a wagon license. It appeared by his instructions, and by those sent to other generals and commanders, that they were directed to favor the trade with Mexicans, as far as practicable consistent with hostile operations. Trade was poor. Plaintiff sold his oxen and remained here until December, when he refitted, and was permitted to join and follow Colonel Doniphan and Lieutenant-Colonel Mitchell, second in command, moving south down the Rio Grande, to open communications with General Wool and General Taylor. El Paso del Norte was finally reached. About 315 large trader's wagons were there with the column, and all were permitted and encouraged to trade with the Mexicans.

At El Paso the United States officers had heard reports of an insurrection at Santa Fe in their rear, and were ignorant of the situation of General Wool and General Taylor at the south. The situation was serious, and what to do was a grave question, enemy's country being in every direction; either to advance, retreat or stand still seemed extremely

perilous, but they decided to proceed. The road from El Paso to Chihuahua, the point desired to reach, was exceedingly rough and long, with long distances without water and grazing. Traders could better care for their teams going alone than with the Army. Troops moving over this road would expose themselves, especially to cavalry.

The scheme of making use of the traders' wagons for defense was contrived by the defendant and other officers. All the traders, except the plaintiff and two others, agreed to this, these three objecting.

There was some controversy upon the trial as to the orders given by Colonel Doniphan. He directed how the wagons proceeding with the Army should march, and that the teamsters be organized into companies and battalions, elect officers, etc. It was admitted that his orders were to be communicated by the defendant to the plaintiff, but it was argued that while he gave some discretionary orders to the defendant, he contemplated the exercise of no force by him to compel the plaintiff to proceed. The defendant, however, with a detachment of men, compelled the plaintiff's men, wagons and mules to proceed and march with the others. The plaintiff protested, both to him and Colonel Doniphan, against the act. This was the seizure and trespass complained of. Some ten days before, the plaintiff had asked leave to proceed to Chihuahua with his wagons without the troops, but had been refused. This, together with his declining to proceed with the others and pretending his mules had been run away with, caused some suspicions and suggestions that he desired to join the Mexicans.

Lieutenant-Colonel Mitchell afterwards gave a certificate stating three reasons why the traders were compelled to accompany the Army:

"1st. We wished to make use of the wagons

and bales of goods to form a field work, in the event of our being attacked by an overwhelming force in the field.

"2d. We wished to avail ourselves of the services of the American teamsters, whom we had armed and organized as an infantry battalion, numbering nearly 300 men.

"3d. We wished to prevent this large amount of property from falling into the hands of the enemy, because it would aid him in paying and equipping his troops."

The march proceeded and the animals of the plaintiff were very much worn and injured and some of them lost. On the march the wagons were so formed and marched as to give protection to the troops and on the last day formed and moved as a "galloping fort" for the artillery during an engagement. The battle being over, Colonels Doniphan and Mitchell hastened to take possession of Chihuahua. The plaintiff's wagons, men and mules were left to take care of themselves. Some of the mules were taken by the artillerymen and soldiers, and some were lost. The wagons were taken to the plaza at Chihuahua, and the goods stored with the Spanish Consul. Colonel Doniphan advised the plaintiff to sell what he could and he attempted to do so, but sold little. In a few weeks, when Colonel Doniphan was preparing to leave Chihuahua, with his troops, the plaintiff gave him an order for his goods, leaving them in the hands of the Spanish Consul. The Mexican authorities returned to Chihuahua at once and seized the goods and sold them. They knew of the plaintiff's being at Chihuahua with the United States troops and he dared not remain there, but retired with the Army.

"The defendant contended that the plaintiff had no right to trade with the enemy; that his property was liable to arrest on that ground; that Colonel Doniphan had a right to prescribe in what order the

plaintiff's wagons should proceed and march; that property was liable to fall into the enemy's hands, and it would have been madness to leave it at El Paso; that the emergency was such as justified taking it, to save the lives of all concerned; that Colonel Doniphan had taken it as a public officer, not for himself, but for the government, and the plaintiff's only remedy was by application to Congress; that the defendant was a subordinate officer; that he only obeyed the orders of Colonel Doniphan; that right or wrong he was bound to obey it, and it was a lawful order; that the plaintiff had resumed the ownership of his property; and that the abandonment of the goods to Colonel Doniphan deprived him of all rights of action against the defendant and occasioned the seizure of the property.

The depositions of certain officers with the command, the action of Congress on plaintiff's petition, and the report of the Secretary of War on the subject were read. In this report, the Secretary of War (Mr. Marcy) had said:

"With regard to the act of Colonel Doniphan in taking possession of the train, it appears to have been justified under the circumstances, if it was necessary to prevent the train from falling into the hands of the enemy—a result of which Mr. Harmony appears to have been desirous, as he was furnished with Spanish passports. And the same may be remarked of the subsequent forced marches whereby his teams were injured."

It appeared that the plaintiff had a passport given by the Spanish Consul in New York on the 4th of April, 1846, certifying that the plaintiff was a native of Spain, and was traveling to Mexico as a merchant. The chief Mexicans, being of Spanish blood and descent, natives of old Spain fared better with them than natives of Missouri or Texas.

Discussion by Counsel,

"Hon. W. L. Marcy, who, as Secretary of War,

had written the above report, attended the trial, and having advised with and assisted plaintiff's Counsel, stated his views respecting the cases in which a military officer might destroy property to prevent it falling into the hands of the enemy, or, in an emergency, take it and apply it to the use of the Government. He argued that unless the officer agreed with the owner, being a citizen or neutral, to pay what the latter demanded for his property, or obtained the consent of the owner to take it, he made himself personally responsible for what he took for the use of his command even under the most pressing circumstances. That if a garrison wants provisions, they could not be permitted to go into a store and take them, and then to justify the act by saying they would otherwise have starved. That there must be an existing and pressing danger to justify the taking of property; that the taking of it because the officer wanted to advance into the enemy's country 200 miles, instead of remaining where he was, could not be justified by the plea of necessity. That in all such cases the officer subjected himself to an action by the owner, although his superiors might have no inclination to censure his course."

THE POINTS OF LAW TO BE DECIDED

1. Was Harmony engaged in unlawful trade with the public enemy?
2. What justified the seizure of private property to prevent its falling into the hands of the enemy?
3. What justified the seizure of private property for public use?
4. Was there a re-delivery to and acceptance by the owner of the property?
5. Responsibility of officer executing order of a superior.

OPINION OF THE COURT

On the different points in question the Court charged the jury as follows:

1. Unlawful trading with the public enemy:

"The principle of law is admitted; but as I understand the evidence, this ground of defense has altogether failed. The plaintiff was not only not so engaged, but was employed in trading with that portion of the territory which was reduced to subjection by our arms, and where his trading with the inhabitants was permitted and encouraged. The Army was directed to hold out encouragement to traders for the purpose of conciliating the inhabitants, and did so."

2. Taking possession of goods of plaintiff to prevent them from falling into the hands of the enemy:

"This has been urged as particularly applicable to his goods, some portions of which consisted of arms and munitions of war, wagons for transportation, etc. Taking the whole of the evidence together, and giving full effect to every part of it, we think this branch of the defense has also failed. No case of peril or danger has been proved, either as it respected the state of the country or the force of the public enemy, which would lay a foundation for taking possession of the goods of the plaintiff at San Eleasario (El Paso), the place at which they were seized. On the contrary, the country was in the possession of the arms of this government; and there was no enemy or hostile public force at the time in the neighborhood which put the goods in danger of being captured. The evidence fails to make out a case of seizure of property on account of the urgent danger of falling into the hands of the enemy. The danger must be immediate and urgent; not contingent or remote; otherwise every man's property, particularly on the frontiers, would be liable to be seized or destroyed, as it always will be more or less exposed to capture by the public enemy. There was no immediate or impending peril in the neighborhood or advancing to put the goods in danger. They were more exposed to marauding parties than to any public force; and those the plaintiff considered himself able to take care of."

3. Taking of the goods by the commanding officer for public use:

"I admit this principle of public law. But this, too, rests upon the law of necessity. I have no doubt of the right of a military officer, in a case of extreme necessity, for the safety of the government or the Army, to take private property for the public service. The officer in command of an army upon its march, if it were in danger from the public enemy, would have the right to seize the property of the citizen and use it to fortify himself against assault while the danger existed and was impending, and, in ordering the seizure, would not be liable as a trespasser. The owner must look to the government for indemnity. The safety of the country is paramount and the right of the individual must yield, in a case of extreme necessity. * * * An immediate and urgent necessity would have justified the seizure for the safety of the Army. Looking, however, at the testimony, it seems to me quite clear that these goods were seized, not on account of any impending danger at the time or for the purpose of being used against an immediate assault of the enemy by which the command might be endangered, but that they were taken into the public service for the purpose of coöperating with the Army in their expedition into the enemy's country. * * * The mules, wagons and goods were not taken to repel a threatened assault, but to strengthen the Army and aid in taking of Chihuahua, 200 miles west. * * * In my judgment, all the evidence taken together does not make out an immediate peril, or urgent necessity, existing at the time of the seizure, which would justify the officer in seizing private property for public service. The evidence does not bring the case within the principle of law."

4. Re-delivery of property to plaintiff:

5. Taking property under order of superior:

"The liability of the defendant for taking the goods and appropriating them to the public service, accrued at the time of seizure. * * * Colonel Mitchell was not alone responsible. Colonel Doniphan, who gave the order, was also liable. They were jointly and severally responsible. * * * Certainly the abandonment of the goods to Colonel

Doniphan at Chihuahua cannot be regarded as an act of resumption of ownership. * * * Colonel Doniphan advised him to sell the goods at Chihuahua and look to the government for indemnity; and, in pursuance of this, measures were taken for their protection and safe keeping. I doubt if there be any evidence showing an intent on the part of the plaintiff to resume ownership over the goods as his private property after they had been seized, or any act done by him that would, when properly viewed, lead to that result."

"After the expression of these views by the Court, the counsel on both sides declined going to the jury, and, under the law as laid down, by the Court, the jury rendered a verdict upon the facts for the plaintiff, for \$90,806.44."

Cases and Authorities Cited

- Del Cal vs. Arnold, 3 Dall. (3 U. S.) 333.
Murray vs. Charming Betsey, 2 Cranch (6 U. S.) 64.
Maley vs. Shuttuck, 3 Cranch (7 U. S.) 458.
The Julia, 8 Cranch (12 U. S.) 181.
The Anna Maria, 2 Wheat, (15 U. S.) 327.
Gilston v. Hoyt, 3 Wheat. (16 U. S. 246, 274, 327.
United States vs. Rice, 4 Wheat, (17 U. S.) 246.
United States vs. Eliason, 16 Pet. (41 U. S.) 291.
McKenna vs. Fiske, 1 Howard (42 U. S.) 241.
Fleming vs. Page, 9 Howard (50 U. S.) 603.
Mayor & C. N. Y. vs. Lord, 17 Wind. 285.
Wilson vs. Mackenzie, 7 Hill, 95.
Sutton vs. Johnstone, 1 Term R. 493.
O'Brien, Military Law, pp. 337, 344.
Martin vs. Mott, 12 Wheat. (25 U. S.) 29, 32, 33.
The Marianna Flora, 11 Wheat. (24 U. S.) 1.
The Rapid, (Case No. 11576.)
Wilkes vs. Dinsman, 7 Howard (48 U. S.) 130, 131.
Griswold vs. Waddington, 16 Johns. 438.

Mitchell vs. Harmony

Supreme Court of the United States, 1850, 13 Howard 118

Statement of the Case

At the trial in the Circuit Court of the Southern District of New York, October term 1850, the verdict and judgment were for the plaintiff. On appeal, under writ of error, on the ground that erroneous and improper instructions were given to the jury by the Circuit Court, the case was argued before the Supreme Court of the United States. (See charge to jury in *Harmony vs. Mitchell*).

THE POINT OF LAW TO BE DECIDED

The objection was 'that the court had stepped outside of its duty and authority and expressed opinions on questions of fact, which it was the exclusive province of the jury to decide, thereby duly influencing the jury.'

OPINION OF THE COURT

Chief Justice Taney, delivering the opinion of the Court, said:

"The passages in relation to questions of fact are nothing more than the influences which in the opinion of the Court were fairly deducible from the testimony, and were stated to the jury not to control their decision, but submitted for their consideration in order to assist them in forming their judgment. This mode of charging the jury has always prevailed in the State of New York, and has been followed in the Circuit Court ever since the adoption of the Constitution".

The Court went on further to show that the

practice was different in the several states, that in some the Court neither sums up the evidence nor expresses an opinion upon any question of fact, confining itself strictly to questions of law. But that in most of the States the practice was to sum up, and point out the conclusions which in its opinion ought to be drawn, and then submit the facts to the judgment of the jury. That either may be adopted under the laws of Congress, and further that as it was desirable that the practice in the courts of the United States should conform, as nearly as practicable, to that of the state in which they were sitting, that mode of procedure was perhaps to be preferred, which, from long usage and practice, had become the law of the courts of the State.

The Court said:

“The right of a Court of the United States to express an opinion upon the facts in a charge to the jury was affirmed by this Court in the case of *M’Lanahan vs. The Universal Insurance Co.*, (1 Pet. 182), and *Games vs. Stiles* (14 Pet. 322). Nor can it be objected to upon the ground that the reasoning and opinion of the Court upon the evidence may have an undue and improper influence on the minds and judgment of the jury. For an objection of that kind questions their intelligence and independence, qualities which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belongs to it, in questions in fact.
* * * After the questions of law had been raised and argued by counsel the court stated the view it proposed to take of the evidence in the charge about to be given. And it was evident that this was done for the purpose of giving the counsel an opportunity of going before the jury, to combat the inferences drawn from the testimony by the court”.

The counsel declined to go before the jury, which action the court states:

“Evidently showed that they acquiesced in the

opinion expressed by the court and believed that they could not be successfully disputed.

"And the court thereupon charged the jury that if they agreed with him in his view of the facts, that they would find for the plaintiff, otherwise for the defendant. * * *

"It is manifest, therefore, that the Circuit Court did not, in its instructions, trench upon the province of the jury, and that the jury could not have been misled as to the nature and intent of their own duties and powers; and the opinions upon the evidence as therein stated must now be regarded as facts found by the jury; and as such not open to controversy in the court".

Having settled the objections to the instructions given the jury in the case in the Circuit Court, the court then proceeded to examine the questions decided by the court below, and brought up by the writ of error.

"It was admitted that the plaintiff, against his will, was compelled by the defendant to accompany the troops with the property in question on the march from San Elisario to Chihuahua; and that he was informed that force would be used if he refused. Unquestionably this was taking the property by force from the plaintiff; and a trespass on the part of the defendant, unless he could show good and legal grounds for the taking. The defendant justified in the taking on five grounds.

1. That the plaintiff was engaged in trading with the enemy.
2. That he was compelled to remain with the American forces, and to move with them, to prevent the property from falling into the hands of the enemy.
3. That the property was taken for public use.
4. That if the defendant was liable for the original taking, he was released from damages for its subsequent loss by the act of the plaintiff, who had resumed possession and control of before the loss happened.

5. That the defendant acted in obedience to the orders of his commanding officer, and was therefore not liable.

The first objection was overruled by the court, and we think correctly.

There was no dispute about the facts in this part of the case * * * The trader was engaged in only such trade as was sanctioned and encouraged by the constituted authority, acting within the scope of its lawful powers, and that an officer of the army could not seize the property of an American citizen so engaged. Mere rumors or suspicions of an illegal intention is not sufficient, but the fact that such an intention did exist must be shown. There was no evidence to this effect.

As to the 2d and 3d grounds of defense the Circuit Court instructed the jury, that 'to justify the defendant in seizing the goods to prevent them falling into the hands of the enemy, the danger must be immediate and impending and not remote or contingent'. And that 'to justify seizing them for public use in case of danger or necessity, the danger must be immediate and pressing and the necessity urgent and existing, at the time'.

"The jury decided that no such danger or necessity, such as the court described, existed.

The instruction was objected to on the ground, that it restricts the power of the officer within narrower limits than the law will justify. And that, where the troops are employed in an expedition into the enemy's country, where the dangers that meet them cannot always be foreseen, and where they are cut off from aid from their own government, the commanding officer must necessarily be intrusted with some discretionary power as to the measures he should employ; and if he acts honestly, and to the best of his judgment, the law will protect him.

"There are without doubt occasions in which private property may be taken or destroyed to prevent it falling into the hands of the enemy; and also where a military may impress private for public use and not be a trespasser.

"But in all such cases the danger must be immediate and impending; or the necessity urgent and

not admitting of delay, and where the action of the civil authority would be too late in providing means the occasion called for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend upon its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

"His distance from and duties upon which engaged could not enlarge his power nor give him any authority which he would not under similar circumstances have at home.

"In deciding upon the necessity, the state of the facts as they appeared to the officer at the time he acted must govern, as he must necessarily act upon the information of others as well as his own knowledge. If with such information as he has a right to rely upon, there is reasonable ground to believe that the danger is immediate and menacing, or the necessity urgent, he is justified in acting; and the discovery afterwards that it was false or erroneous will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the character of the emergency, and it is then for the jury to decide whether or not it was so pressing as not to admit of delay, or the occasion such as to justify the ignoring of private rights?

"Colonel Doniphan was not deceived by false information, his camp was not threatened at time of taking the property. The property was not taken to defend his position nor to place his troops in a safe one nor to anticipate the attack of an approaching enemy, but to insure the success of the distant and hazardous expedition, upon which he was about to march.

"But it is not for the court to say what protection or indemnity is due from the public to an officer, who, in his zeal for the honor and interest of his country, and in the excitement of military operations has trespassed on private rights. That question belongs to the political department of the govern-

ment. Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it. We think, therefore, that the instruction of the Circuit Court on the 2d and 3d points were right."

As to 4th ground:

"The fourth ground of objection is equally untenable. From the moment they were seized at San Ellisario they were under control of Colonel Doniphan and the loss that occurred was due to this seizure. That the efforts to save the goods from loss at Chihuahua cannot be construed as a resumption of possession. He had been brought there against his will, and the acts of the defendant subjected the goods to the dangers they were in. He could not discharge himself from the consequences of his acts by abandoning the goods, but only by restoring them to the possession of the owner at a place of safety or where the plaintiff was willing to accept them. The liability of the defendant attached the moment the goods were seized. The jury found that the plaintiff did not afterwards resume ownership and possession. Indeed we did not see any evidence in the record from which the jury could have found otherwise."

As to the 5th point:

"If the power exercised by Colonel Doniphan had been within the limits of a discretion given him by law, the defendant would have been justified in executing his orders, even if the commander had abused his power, or acted from improper motives. But the law did not confide to him a discretionary power over private property. Urgent necessity alone could give him the right. The verdict found that the necessity did not exist, and consequently the order was to do an illegal act, and could afford no justification to the one by whom executed."

"Upon principle, independent of the weight of a judicial decision, it can never be maintained that a

military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify. Upon the whole, therefore, it is the opinion of the court that there is no error in the instructions given by the Circuit Court, and that the judgment must be affirmed with costs”.

“Judgment with interest 6 per cent. \$104,562.23. Interest from date of Circuit Court judgment”.

Daniel J. dissented.

His opinion is a long one, but in part he said:

“This disagreement is not so much the result of any views taken by me of the testimony. * * * With some modifications, perhaps unimportant, I might have argued also as to the legal propositions laid down by the Court. * * * My disagreement with the majority relates to the great principle lying at the foundation of all legal inquiries into matters of fact * * * the preservation in its fullest scope and integrity, unaffected and even unapproached by improper influences, direct or indirect, of the venerable, the sacred, the unappreciable trial by jury * * * But after the counsel has been thus silenced, and the weight of the evidence fully and minutely pronounced upon by the court, it is insisted, that the alleged irregularity was entirely cured by a declaration from the court to the jury ‘that if they agreed with him in his view of the facts, they should find for the plaintiff, otherwise they might find for the defendant’ * * * and if the verdict is either formally, or in effect, the verdict, of the judge, it is neither according to truth nor common sense, the verdict of the jury; and these triers of facts had better be dispensed with as an useless, and indeed an expensive and cumbersome *formula* in courts of law, than to be preserved as false *indica* of what they in reality do not show. Moreover, this determination of facts by the court does not place the parties upon equal grounds of contest before the minds of the jury.”

(The language of the Court in these opinions is considerably abridged. Though given as quotations, they are not verbatim.)

Cases and Authorities Cited

M'Lanahan vs. The Universal Insurance Co. 1,
Pet. 182.

Games vs. Stiles 14 Pet. 322.

McKenna vs. Fiske (Jurisdiction) 1 How. 241.

Mostyn v. Fabrigos (Eng.) 1 Cowp. 180.

By Daniel, J. dissenting,

Hanson vs. Eustace 2 How. 706.

Carver vs. Jackson 4 Pet. 80.

Foster page 256.

Lord Coke.

Rex vs. Poole (Kings Bench-Lord Hardwiske
(23).

Ford vs. Surget

Supreme Court of the United States, 1878, 97 U. S. 594

Statement of the Case

During December, 1860, and the year 1861, several States of the Union, including the State of Mississippi, revolted and formed a *de facto* government called the "Confederate States". From the 5th of March, 1862, to the 3rd of May, 1862, and for some time before and after said dates, the United States and the Confederate States waged war against each other as belligerent powers. On March 6, 1862, the Confederate Congress passed an act which was approved and promulgated on the same date, declaring it to be the duty of all military commanders in the Confederate service to destroy all cotton, tobacco and other property that might be useful to the United States forces, whenever said property was likely to fall into the hands of said forces. On May 2, 1862, in obedience to said act, General Beauregard commanding all Confederate forces in the State of Mississippi, issued a general order requiring all officers under his command to burn all cotton along the Mississippi River likely to fall into the hands of the United States forces.

On May 5, 1862 in the State of Mississippi, and partly bordering on the Mississippi River, was a tract of land known as the county of Adams. One Alex. K. Farrar was on that date the Provost Marshal of said county, and as such was subject to the orders of the Commander of the Confederate military forces in Mississippi. On the 5th day of May, 1862, in said

county and State and near the Mississippi River were 200 bales of cotton, valued at \$120,000.00, said cotton being the personal property of one Washington Ford of the State of Mississippi. These 200 bales of cotton being likely, on said date, to fall into the hands of the United States forces, the Provost Marshal, Alex. K. Farrar, acting under the general order aforesaid, ordered and required one James Surget, a civilian, to burn said cotton, which Surget accordingly did. The burning of this cotton took place on May 5th, 1862, together with that of other cotton similarly destroyed for the same purpose.

On October 2, 1866, Ford brought suit against Surget in the Circuit Court of Adams County, alleging that Surget

“Did willfully and utterly and against the consent and will of said plaintiff, destroy by fire the said 200 bales of cotton.”

Judgment was given for the defendant. The case was then taken by the plaintiff upon a writ of error to the Supreme Court of Mississippi. The State Supreme Court affirmed the decision of the lower Court, and then the plaintiff took the case to the U. S. Supreme Court.

THE POINTS OF LAW TO BE DECIDED

When one or more States of the United States have become insurgent, have completely subverted the federal authority within their borders, and their armies have been granted by the United States the rights of belligerents:

1. If said armies have as belligerents destroyed the property of certain resident citizens of said insurgent States, if after the reestablishment of the federal authority in such insurgent States, suit has been brought against the person having actually destroyed such property, and if the State courts have

affirmed the validity of said act of destruction—if all these conditions have been fulfilled, has the United States Supreme Court appellate jurisdiction as to the validity of said act of destruction?

2. Is the destruction by a belligerent army of the personal property of a citizen of its own State, to prevent said property from falling into the hands of the enemy and giving him great aid and comfort, a proper act under the rights of a belligerent?

3. Is a civilian of the insurgent State, in carrying out the orders legally given him by the military authorities of the belligerent army to destroy the personal property of a fellow citizen, acting under duress in carrying out said order, and is his act that of said belligerent army?

OPINION OF THE COURT

1. In the case described in the first question, the United States Supreme Court has appellate jurisdiction. The affirmation by the State Supreme Court, after the return of said State to the federal authority, of the validity of the act committed by the belligerent army in its territory during its insurgency, is considered as making the order for said act a statute of that State, and as such, within the meaning of the act declaring the appellate jurisdiction of the Supreme Court.

2. The destruction by a belligerent army of the personal property described in Question 2 is the proper act of a belligerent.

This cotton, for the burning of which damages are claimed in a civil action, was, at the time, hostile property, being within the district of insurgency, and produced upon insurrectionary soil; and cotton in general formed the principle source from which the Confederates obtained the munitions of war.

Such property was therefore hostile property to

the United States and subject to seizure or destruction by the United States forces, the seizure benefiting the federal forces and the destruction injuring the Confederate strength. Its destruction therefore by Confederate military authorities, the other belligerent party, was equally an act of war and a proper act of a belligerent.

3. As to question (3), Justice Harlan, in delivering the opinion of the Court, says:

“But it is insisted with much earnestness that Surget should not be allowed to take shelter under these rules, since it is not averred in the special pleas that he constituted any part of or held any official relations to the military forces of the rebellion. But such a technical, narrow construction of the special pleas should not be allowed to prevail in a case like this. It is distinctly alleged that the Confederate government was, at the time of the burning of the cotton, exercising all the functions of civil government within the State of Mississippi, and over its property and inhabitants. It is further alleged that the defendant was an inhabitant and citizen of Mississippi, subject to Confederate power, authority and jurisdiction, and that he was ordered and required by the provost marshal—charged by the rebel department commander with the execution of the order, to burn the cotton in Adams County likely to fall into the possession of the Federal forces—to burn the cotton on Ford’s plantation—and that it was so burned in obedience to the act of the Confederate Congress, and the orders of the military authorities. These allegations seem sufficiently comprehensive to admit evidence that the defendant acted under duress or compulsion. Taking into consideration the extraordinary circumstances which then surrounded the people of Mississippi, especially the absolute authority which the Confederate Government and its military commanders were then exercising over that portion of the territory and people of the U.S., the special pleas should be deemed, upon demurrer, as sufficiently averring the existence of such relations between Surget and the rebel mili-

tary authorities as entitled him to make the same defense as any soldier, regularly enlisted in the Confederate army, acting under like orders could have made."

Cases Cited by the Court

Williams vs. Bruffy, 96 U. S. 716
Dewing vs. Perdicaris, 96 U. S. 654
Young vs. U. S., 96 U. S. 992
Prize Cases, 2 Black 635
Mrs. Alexander's Cotton, 2 Wallace 404

NOTES

1. Jecker vs. Montgomery, 18 Howard 123 (1855). During the Mexican War, the ship Admittance, belonging to citizens of the United States, was captured by the United States war vessel Portsmouth Captain John B. Montgomery, commanding, at San Jose in California, while that place was in the occupation of the American forces. The Admittance had left New Orleans several months before and was charged with having traded or communicated with the enemy during the voyage. Being at a great distance from the United States proper and having no men to spare as a prize crew to send the vessel to the United States for adjudication, Captain Montgomery disposed of the vessel and cargo and turned the money into the Treasury of the United States.

In regard to this action the Supreme Court of the United States lays down several principles with regard to the use of discretionary powers by commanding officers, as follows:—

Should it be conceded, the plaintiff claimed, that there existed originally sufficient grounds for capture and condemnation still the captor had forfeited all right of prize by omitting to send the vessel and cargo to the United States for adjudication and by selling them without justification of necessity in a foreign country. In justification the libellant has alleged that at the time of the capture he was at a great distance from the United States and without

weakening inconveniently the force under his command in his own ship, he could not have spared a sufficient prize crew and officers to command the captured ship and to bring her into the United States.

That captors may act towards prize property so as to forfeit their rights as captors and render themselves liable to make restitution, with or without damages, is clear? But before the court can so declare a case of forfeiture of rights free from all doubts must be made out. Before considering the facts upon which the forfeiture is asserted one principle should be stated. It is that an honest exercise of discretion necessarily arising out of his command cannot be treated as such misconduct in the commander of a public war ship as will forfeit his fair title and render him liable to be treated as a trespasser.

The question whether the necessities of the public service will allow a commander in such circumstances to spare one of his officers to go home in command of a prize is one depending on his discretion. Certainly his judgment is not conclusive—good faith and reasonable discretion are necessary. It is true that it is the clear duty of the commander to send his prize home for adjudication but this is not an absolute obligation. It depends upon his ability to perform it, of which he must be the judge, and if he decides with reasonable discretion and an honest purpose to do his duty I cannot consider him guilty of misconduct.

2. *Little vs. Barreme*, 2 Cranch 170 (1804). On December 2, 1799, during the operation of the Act of Congress of February 9, 1799, of non-intercourse with France, the *Flying Fish*, a Danish vessel, having on board neutral property and being on voyage from Jeremie, a French port, to St. Thomas, a Danish port, was captured by the U. S. S. *Boston*, commanded by Captain Little, brought to the port of Boston where she was formerly charged with being an American vessel and as such with a violation of the act. The judge before whom the case was tried ordered the restoration of the vessel and cargo but refused damages for the capture and detention declaring that there was reasonable cause to suspect

that the vessel was American. Case appealed.

The act in question provided that every vessel owned wholly or in part by an American and hired or employed in traffic or commerce with or for any person within the jurisdiction or under the authority of the French Republic was, with her cargo, to be forfeited. It authorized the President to instruct the commanders of armed vessels of the United States to stop and examine any ship or vessels of the United States on the high seas which there may be reason to suspect to be engaged in any traffic or commerce contrary to the tenor of the act and directed that if upon examination it should appear that such ship or vessel was bound to any place within the jurisdiction of the French Republic then it was lawful to seize the same and send her into the United States for adjudication. Pursuant to this act the President, through the Secretary of the Navy, instructed the commanders of all war vessels that they were to carry out the provisions of the act, calling their attention especially to the fifth section thereof just mentioned, and directing that "you are not only to do all that in you lies to prevent all intercourse, whether direct or circuitous, between ports of the United States and those of France and her dependencies, where the vessels are apparently as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports do not escape you."

The Supreme Court of the United States, in construing the act, says that the fifth section gives a special authority to seize on the high seas and limits that authority to the seizure of vessels bound or sailing to French ports. The legislature therefore seem to have prescribed the manner in which this law shall be carried into execution and to have excluded a seizure of any vessel not bound to a French port.

The orders showing plainly the meaning of the act as construed by the Executive Department, is the officer who obeyed them liable for damages sustained by such misconstruction or will his orders ex-

cuse him? If his instructions afford him no protection then the law must take its course and he must pay such damages as are legally awarded against him. If they excuse an act not otherwise excusable, it would then be necessary to inquire whether this is a case in which the probable cause which existed to induce a suspicion that the vessel was American would excuse the captor when the vessel appeared in fact to be neutral.

I (Chief Justice Marshall) confess that the first bias of my mind was very strong in favor of the opinion that, though the instructions of the Executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between the acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensibly necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded and would be a proper subject for negotiation. But I have been convinced that I was mistaken and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize the act which, without those instructions, would have been a plain trespass."

Military Government Tribunals

Ex Parte Ortiz

**Circuit Court, District of Minnesota, 1900, 100 Federal
Reporter 955**

Statement of the Case

During the war between the United States and Spain, Porto Rico was invaded, July, 1898, by a force of United States troops under Major General Miles, and the military possession thus secured was continued up to the cession of the island by Spain to the United States, by the treaty of Paris, signed December 10, 1898 and ratified April 11, 1899.

On October 1, 1898, the President of the United States established the Military Department of Porto Rico under command of Major General John R. Brooke, who was succeeded by Brigadier General Guy V. Henry, December 6, 1898.

On March 27th, 1899, Rafael Ortiz, a civilian and resident of Porto Rico, was brought before a military commission convened to first meet at San Juan, Porto Rico, February 20, 1899, by order of Brigadier General Guy V. Henry, commanding officer of the Department of Porto Rico. Ortiz was charged with the murder of John Burke, Private, Co. "C", 47th Infantry, February 24, 1899, and of carrying concealed weapons. He was convicted and sentenced to death. The President commuted the sentence to imprisonment at hard labor for life in the Minnesota State Prison at Stillwater, Minnesota.

On the 2nd and 3rd days of May, 1900, the said Ortiz was produced in the Federal court room at St. Paul and hearing was had before District Judge Lochren of the amended return of C. McC. Reeve,

warden of the Minnesota State Prison to a writ of *habeas corpus* issued in the case. No objection to the regularity of the proceedings was made.

The petitioner claimed that when tried, March 27th, 1899, Porto Rico was at peace; that this island was then a part of the United States; that the said petitioner was a civilian and native resident of Porto Rico and had never belonged to the army or navy of the United States, and therefore the military commission had no jurisdiction to try him for the alleged murder; that under the provisions of the constitution of the United States he could be tried only by a jury after indictment or presentment by a grand jury.

The United States contended, 1st, that Porto Rico was made by its cession not an integral part of the United States but a province or dependency subject to the absolute control of Congress untrammelled by the constitution.

2d. That the War with Spain was not ended, so as to displace the jurisdiction of military commissions, until the ratification of the treaty on April 11, 1899, and that even after that, such jurisdiction continued until displaced by some act of Congress.

THE POINTS OF LAW TO BE DECIDED

The principal questions of law, therefore, were:

1. Did the cession of Porto Rico to the United States make it an integral part of the United States subject to the constitution?
2. When does a treaty as affecting private rights become effective?
3. What jurisdiction have military tribunals over civilians in the occupied territory of the enemy?

OPINION OF THE COURT

1. The cession by Spain of Porto Rico made it

as much a part of the United States as Arizona and therefore subject to the constitution.

The learned judge said in part:

“The power of the general government to acquire additional territory rests upon its constitutional power to make war, which may result in conquest, and its like power to make treaties, which may bring territory by cession. The power to govern such acquired territory results from the power to admit new States and to make all needful rules and regulations respecting the territory or other property belonging to the United States. This clause authorizes Congress to legislate in respect to territory in local as well as national matters before its admission to statehood in the Union. As said by Chief Justice Marshall in *Insurance Co. vs. Canter*, 1 Pet. 546, 7 L. Ed. 257:

“In legislating for them, Congress exercises the combined powers of the general and of a State government.”

“This definition of the power of Congress in respect to the territories has often been repeated and is exact. It leaves the territory under the protection of the Constitution, which grants the power, and which enumerates every power of the general government, and to which the State governments are subordinate.

“The novel doctrine that the power to Congress to govern territory ceded to the United States may be conferred by a foreign sovereign by and through the terms of the treaty of cession, and that the general government can exercise powers thus granted by a foreign sovereign, independent of and in disregard of the Constitution, until Congress mayhap in future shall, by its enactment, see fit to extend the Constitution over the territory, is contrary to the holding of the Supreme Court of the United States above cited, to the effect that the general government is one of enumerated powers and can claim and exercise no power not granted to it by the Constitution, either expressly or by necessary implication. It is clear that the government cannot legislate over territory where the Constitution from which its

every power is derived does not extend. The Constitution must be in force over a territory before the general government can have any authority to legislate respecting it. No foreign sovereign can invest the general government with any legislative power.”

* * * *

As said by Chief Justice Marshall in *Martin vs. Hunter's Lessee*, 1 Wheat. 326, 4 L. Ed. 102:

“The government, then, of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given or given by necessary implication.”

* * * *

“The plain, obvious and undeniable fact is that the general government of the United States, created by the Constitution and possessing no vitality or power not directly drawn from that instrument, can only exist and legislate where that Constitution is in force, and that every tract of territory that comes under the sovereignty of the United States comes necessarily under that Constitution which alone gives life to that sovereignty, and beyond which that sovereignty must cease.”

* * * *

“It follows that all the provisions of the Constitution in respect to personal and property rights, including the right to trial by jury in criminal prosecutions, became at once, when the cession was completed, a part of the supreme law of the land.”

2. While war lasts a conquered territory is rightly subject to military government. This is a temporary condition, however, and is followed by new conditions imposed by treaty. The terms of the treaty are first agreed to and signed by the representatives of the sovereign, but it only becomes effective as far as private rights are concerned when ratified by the governments.

3. During war it devolves upon a military commander of a conquered territory to govern in-

habitants and punish their crimes. The military commission is a lawful means to this end. Although Rafael Ortiz was a civilian, he could be lawfully tried by a military commission while a state of war existed. As far as the private rights of the petitioner were concerned, the war did not end until the ratification of the treaty April 11, 1899. His trial during March, 1899, was therefore lawful, although the commissioners had signed the Treaty of Paris December 10, 1898.

The petitioner's application was therefore denied, and he was remanded to the custody of the warden of the Minnesota State Prison.

CONCLUSION

The decision of District Judge Lochren that the Constitution follows the flag is not generally accepted. The consensus of opinion seems to be the opposite on this much discussed question.

In the case of *Dorr vs. United States* (195 U. S. 149) it was held as to the right of a civilian to trial by jury in the Philippine Islands:

"The Constitution does not without legislation and of its own force, carry such right to territory so situated."

In the case of *Endleman vs. United States* (86 Fed. Rep. 456) the Court declared:

"Congress has full legislative power over the territories, unrestricted by the limitations of the Constitution."

Also in this connection see "*In re Ross*, 140 U. S. 453, and *Neeley vs. Henkel*, 180 U. S. 109 (1901).

"The doctrine that Congress in legislating for territory outside of the boundaries of the several States of the Union is not bound by the limitations imposed by the Constitution, was approved by the Secretary of War and adopted by the enactment of

the Foraker Act providing a civil government for Porto Rico (31 Stat. L., 77), which act was approved by the President and sustained by the Supreme Court of the United States in the insular cases (182 U. S., 1—498); (Magoon's Reports, p. 120, submitted Feb. 12, 1900).

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Whitney v. Robertson, 124 U. S. 190, 8 Sup. Ct. 456, 31 L. Ed. 386.

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First National Bank v. Yankton Co., 101 U. S. 129, 133, 25 L. Ed. 1047.

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U. S. v. Arredondo, 6 Pet. 691-757, 8 L. Ed. 547.

Ex Parte Milligan, 4 Wall. 2, 18 L. Ed. 281.

Haver v. Yaker, 9 Wall. 32, 19 L. Ed. 571.

When Military Government Ceases

Leitensdorfer v. Webb

Supreme Court of the United States, 1857, 20 Howard 176

Statement of the Case

Shortly after the declaration of war between the United States and Mexico, a force of American troops under General Stephen Watts Kearney, invaded the Mexican province of New Mexico, and on August 18, 1846, arrived at Santa Fe, the capital, succeeding in conquering the province without firing a shot.

In accordance with the law of nations and pursuant to his instructions from the War Department, General Kearney at once set about organizing a military government for New Mexico, to take the place of the Mexican government he had overthrown, and on September 22, 1846, he started the new government into operation, by the promulgation of an organic law, a territorial code, and the appointment of several governmental officials.* Among other things provisions was made in the organic law for sundry civil officers, several courts of justice, and of the latter was provided a Circuit Court for the County of Santa Fe.

While there was, apparently no doubt in the minds of any one as to the right of an occupying belligerent, to establish a government in the territory he occupied; yet there appears to have been considerable doubt as to the propriety of such a government to continue to exist and exercise its functions after peace had been declared.

*House of Rep. Exec. Doc. No. 19, 29 Cong. 2nd Session.

The treaty of peace between the United States and Mexico took effect on May 30, 1848, but nevertheless the military government established by General Kearney continued to exist and exercised its functions until about March 3, 1851, when the territorial government established by Congress went into effect.*

In the Kearney Code (the above mentioned code established by General Kearney's Military Government) it was provided that creditors could proceed against their debtors by attachment and prescribed the instances in which this remedy could be used as follows:—

"Creditors whose demands amount to \$50.00 or more may sue their debtors in the Circuit Court by attachment in the following cases:—

1st. When the debtor is not a resident of the territory.

2d. When the debtor has concealed himself or absconded, or absented himself from his usual place of abode in this Territory, so that the ordinary process of law cannot be passed upon him.

3d. When the debtor is about to remove his property or effects out of this Territory, or has fraudulently concealed or disposed of his property or effects, so as to hinder, delay or defraud his creditors." (Leitensdorfer vs. Webb, 20 How. 176).

James J. Webb instituted proceedings in attachment against Eugene Leitensdorfer and Joab Houghton the last two being members of the firm of Leitensdorfer & Co. to recover the amount due on a promissory note, by filing in the Circuit Court for the County of Santa Fe his petition and affidavit, all in due form and in accord with the law as established by the military government, In his affidavit Webb

* Letter from the Secretary of War to the President of the Senate. Senate Exec. Doc. No. 71. 32 Cong. 2d Session.

stated that Leitsendorfer and Co. had fraudently disposed of their property and effects, and the case was therefor laid under the third clause of the above mentioned section of the Kearney Code.

At the October Term 1849 of the Circuit Court the defendants appeared and filed a demurrer and no further action appears to have been taken in the Circuit Court.

On September 9, 1850 the act of Congress providing for a territorial government for New Mexico was passed and as before stated this government went into effect the following March.

By the act of Congress creating the Territory the judicial power was vested in a Supreme Court, District Courts and justices of the peace.

On September 19, 1851 Webb moved the District Court of the United States for the First Judicial District for leave to file therein the papers of his case against Leitsendorfer and Houghton, and the court ordered that the case be entered on its docket, thereby transferring the case from the Circuit Court of of the military government to a District Court of the territorial government. The defendants objected to this transfer on the ground that the territorial legislative assembly had no authority to authorize such a transfer. The objection was overruled.

On March 25, 1852 the defendants plead to the averments of the plaintiff's petition and affidavit and prayed judgment on the ground that on July 30, 1849 they had not fraudently disposed of their property so as to hinder, delay and defraud their creditors. On October 1, 1852 the case went before a jury on the petition and affidavit of the plaintiff, the plea of the defendants, and evidence produced by Webb, in the nature of an assignment by Leitsendorfer whereby he had conveyed all his effects, of the firm of Leitsendorfer & Co. and also an instrument executed by

Joab Houghton whereby he authorized the assignees of the late firm of Leitensdorfer & Co. to use his name in any way necessary for the settling up of the business of the firm; the tendency of this evidence being to bring the case squarely under the third clause of the above mentioned section of the Kearney Code. The jury found the plaintiff's affidavit to be true and the defendants were then called on to plead to the merits of the case. The evidence being in the case again went to a jury who awarded damages to Webb assessed at \$10,330,25.

Appeal was then taken to the Supreme Court of the Territory where on February 28, 1853 the District Court was sustained. The case was then appealed to the Supreme Court of the United States.

THE POINTS OF LAW TO BE DECIDED

1st. Whether or not the property rights of citizens of an occupied territory are affected by a change of allegiance.

2nd. Whether the military government established by General Kearney, in New Mexico, had any right to continue to exist and exercise its functions after peace had been declared to exist; for this case had been initiated in one of the courts established by the military government and under a section of the military code established by the same authority. If the military government were illegal it stands to reason that any case initiated under provisions established by it would be a nullity.

3rd. Whether the Legislative Assembly of the Territory of New Mexico had a right to transfer a cause pending in a Circuit Court of the Military Government to a Territorial Court established by Congress.

OPINION OF THE COURT

On the first question the court decided that it

was "to maintain the security of the inhabitants in their persons and property" that the military government was ordained by General Kearney. That the former political relations of the inhabitants were dissolved "but that their private relations, their rights vested under the government of their former allegiance or those arising under contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the occupying and conquering authority should ordain. Among the consequences which would be necessarily incident to the change of sovereignty, would be the appointment and control of agents by whom and the modes in which the government of the occupant should be administered—this result being indispensable in order to secure those objects for which a government is usually established."

On the second question the court decided that of the validity of the ordinances of the provisional government

"there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation, these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them. But it has been contended, that whatever may have been the rights of the occupying conqueror as such, these were all terminated by the termination of the belligerent attitude of the parties, and that with the close of the contest every institution which had been overthrown or suspended would be revived and re-established. The fallacy of this pretension is exposed by the fact that the territory never was relinquished by the conqueror, nor restored to its original condition of allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty; and this under the settled pur-

pose of the United States never to relinquish the possession acquired by arms. We, conclude, therefore, that the ordinances and institutions of the provisional government would be revoked or modified by the United States alone, either by direct legislation on the part of Congress, or by that of the Territorial Government in the exercise of powers delegated by Congress."

As to the third question the court decided that "it was undoubtedly within the competency of Congress either to define directly, by their own act, the jurisdiction of the courts created by them, or to delegate the authority requisite for that purpose to the Territorial Government; and by either proceeding, to permit or deny the transfer of any legitimate power or jurisdiction previously exercised by the courts of the provisional government, to the tribunals of the government they were about to substitute for the Territory, in lieu of the temporary or provisional government. This power, we consider was delegated by Congress to the Territorial Government by the 7th section of the Act of 1850 which declares that 'the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and with this act;' and by the 10th section of the act which after ordaining a Supreme Court, District and Probate Courts, and justices of the peace, and after dividing the territory into three judicial districts, and directing a District Court to be held in each district by the judges of the Supreme Court, goes on to declare that 'the jurisdiction of the several courts therein provided for shall be both appellate and original, and that of the Probate Courts and of justices of the peace shall be limited by law.'

"The inquiry regularly suggested by these provisions of the act of Congress is not whether they invested the legislative assembly with authority to prescribe the subjects for the cognizance of the courts created by that act—of this there can be no doubt—but whether the authority delegated to that assembly had been in fact, and to what extent, exerted with reference to controversies previously in

litigation in the courts of the provisional government, and to subjects of controversy subsequently arising.”

In deciding this point the Supreme Court stated that the legislative assembly have in several instances prescribed the powers and duties of the Territorial Courts, and among others by the 4th Section of the act of the assembly passed on July 12, 1851, it was declared “that the District Courts should have original jurisdiction in all cases, civil and criminal, in which the jurisdiction is not specially delegated to some other court; and by the 2d Section of the act of the assembly, approved on the 14th day of July, 1851, expressly providing ‘that all bonds, writs, and processes, which have remained in force, shall be carried to a final decision in the courts established by the legislative assembly, to the same effect as they would have been in the courts previously existing.’ As the legislative assembly possessed no power to organize or create courts differing from those created by the act of Congress * * * it would seem to follow that by an act of the legislative assembly designed to preserve and to prevent the discontinuance of rights in litigation, subsisting in courts of the provisional government, the distribution of the cognizance of those rights was intended to be made to courts corresponding in their jurisdiction with the tribunals of the provisional government.”

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